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'LIFTING THE ASSOCIATION'S VEIL': INADEQUACIES IN PENALIZING TRADE ASSOCIATIONS FOR ANTI-COMPETITIVE BEHAVIOUR

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ABSTRACT

Trade associations play a vital role in providing a platform for discussion on issues of common interest, for laying down standards of business and facilitating legitimate cooperative behaviour in case of negotiations with government bodies. The legitimate functions of the association have to be distinguished from the illegitimate anti-competitive practices. The Competition Commission of India ["CCI" or "Commission"] on many occasions has lifted the charade to penalize the actions of trade associations when they were devised to further anti-competitive ends. However, there are concerns with respect to the adequacy of fines imposed on the trade associations. The imposition of a fine on the basis of annual receipts has raised questions about its deterrence value. The present article first examines the anti-competitive practices of the trade associations and proceeds to assesses the quantum of penalties imposed on them by the regulator. It is argued that the present system of penalizing trade associations is inadequate and requires the regulator to lift the veil of association to penalize on the basis of turnover of constituent members.

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I. INTRODUCTION

Market regulation entails encouraging the desired behaviour from the market participants as well as discouraging undesirable behaviour by implementing a mechanism to punish such undesired or non-compliant behaviour. The deterrence of anti-competitive behaviour is a crucial part of antitrust enforcement and punishing an offender (disutility) is justified to prevent others from committing the same offence (utility to society). The quantum of penalty should be fixed at a level that will *"deter unlawful conduct to an efficient level"*.[1] Therefore, if the unlawful conduct has only costs and offers no benefits to the society or if the costs always outweigh the loss to society, the quantum of penalty should be kept at the *"absolute deterrence level"*.[2] Any amount of penalty would be able to create deterrence only if the business organizations know that the penalties accrued would surpass any profit they would make out of violation of competition laws. The deterrence level of the penalty is also affected by the probability of detection. The optimal sanction *"must consist of a fine equal to the perpetrator's expected gain from the violation multiplied by the inverse of the probability of detection"*.[3] Law generally combines the theory of deterrence with the idea of proportional punishment and the ability to pay off the offender by providing for an upper ceiling to the quantum of penalty. While the practical fines are themselves lower than the theoretically shown level required to create deterrence, the inability of the competition authority to adequately penalize trade associations acting in violation of competition law further lowers the deterrence value of penalties.

II. WORKING OF TRADE ASSOCIATION AND ITS INTERFACE WITH COMPETITION LAW

Trade Associations play a crucial role in *"mobilising voices of market players in a sector or across sectors, which help them in negotiating issues of common interest to the members*"[4]. They help in improving the standards of operation and act as platforms for collective bargaining, thus creating a conducive environment of business for all the stakeholders. Some of the activities of the trade associations - like product standardization and harmonization to improve the product quality and safety, promotion of good business practices, advocacy of industry interests before

[1] K. Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(2) Melbourne University Law Review 440.
[2] *Ibid.*
[3] John M. Connor and Robert H. Lande, 'Cartel Overcharges and Optimal Cartel Fines' (2008) 3 ICLP 2203 accessed December 2021.
[4] Competition Commission of India, *Introduction to Competition Law (Part 3 - Trade/Industry Associations)*, accessed at CCI Trade Association.

governments and public agencies, determination of ethical rules for professions[5] - are functions that that can only be pursued if businesses cooperate and collaborate, thereby shaping the way the respective industries work.[6] The operation of trade associations enhances consumer welfare and has a positive effect on market efficiency. Such cooperation, however, can limit the autonomous decision-making process of individual business units and consequently undermine the competitive process which in turn proves detrimental to consumer welfare.

The right to associate freely or join an association is protected by law and therefore participation or membership in an association is not unlawful under the competition law.[7] The legitimate functions of the trade associations involving repeated contacts may, however, provide an opportunity for the competitors to co-ordinate their behaviour that is detrimental to the overall competition in the relevant market. The legitimate and important function performed by the trade association may not preclude them from either facilitating collusion or indulging in anti-competitive activities themselves. A distinction, therefore, has to be made between the legitimate functions of the trade association that increase market competitiveness and the illegitimate activities that undermine competition. Exchange of information related to price, quantity, customer base, production, business strategy, etc., may facilitate collusion between the horizontal players.[8] A study of cartel prosecution shows that many trade associations have been used as a platform to both, sustain and monitor the cartel. Even under the erstwhile MRTP Act, 1969,[9] the activities of the trade associations were held to be anti-competitive for creating barriers to entry or foreclosing competition in the relevant market by preventing entry of new players through unreasonable and discriminatory standards. The Competition Commission of India ["**Commission**"] in the *Bengal Chemist and Druggist Association Case* observed, "*When the trade associations indulge in taking commercially sensitive business decisions on behalf of the entire industry as to whether or not to offer discounts, 24x7 service, free home delivery etc., then competitive forces are not allowed to operate in the market for furtherance of one's business. Innovative business practices, superior services, consumer choice, lower prices, etc., take a back*

[5] Competition Commission of India, *Fair Play Volume 2: July - September 2012*, https://www.cci.gov.in/sites/default/files/Newsletter_document/Newsletter_Sept.pdf.
[6] OECD, *Potential pro-competitive and anti-competitive aspects of trade Associations, Policy Roundtables* (2007), https://www.oecd.org/daf/competition/sectors/41646059.pdf accessed 5 March 2022.
[7] The Constitution of India 1950, Article 19(1)(c).
[8] S.W. Waller, 'Trade Associations, Information Exchanges and Cartels', (2018) 30(2) Loyola Consumer Law Review 163.
[9] See, *Sirmur Truck Operator*, [1995] 3 CTJ 332 (MRTPC); *Vinod Chopra, Prop. Vinod Chopra Productions* v. *Film Makers Combine (FMC)*, [2001] CTJ 436 (MRTP); *Johnson & Johnson Ltd.* v. *Maharashtra State Chemists & Druggists Associations & others.*, [2002] CTJ 265 (MRTP); *Bhiwadi Manufacturers Association* v. *Truck Operators Association*, 1 CTJ 126 (MRTPC); *In re: Goods Truck Operators' Union, Faridabad*, RTP Enquiry No. 1313/1987 [1989].

seat and do not become the guiding force for doing business. Consequently, not only the businesses suffer but irreparable harm is caused to the consumers."[10]

The Indian Competition Act, 2002 ["**Act**"] does not create any exception for the trade associations. As per clause (v) of Section 2 (l), 'person' includes, "an association of persons or a body of individuals, whether incorporated or not".[11] Section 3 of the Act prevents 'association of persons' or 'association of enterprises' to enter into an agreement that causes or is likely to cause an appreciable adverse effect on competition ["**AAEC**"].[12] In addition, Section 3(3)(d) specifically includes 'practice' carried on or 'decision' taken by any association of persons or enterprises engaged in identical or similar trade.[13] The decisions of the trade association can be examined as an 'agreement' indicating consensus or meeting of mind between constituent members or as a decision of the trade association itself. The Commission has examined the actions of trade associations for abuse of dominant position under Section 4 of the Act only after declaring that the association is an 'enterprise' under Section 2(h) of the Act.[14] However, if the role of the trade association is limited to being a platform for its members and it does not undertake any commercial activities, then it cannot be categorized as an 'enterprise' which will keep its actions outside the scope of Section 4 i.e., Abuse of dominance.

Liability for anti-competitive behaviour befalls the trade association, as an entity in itself, if it had a *"separate role in suggesting, orchestrating or executing an illegal conduct."*[15] Sanctioning the trade associations, however, may pose practical challenges before the competition authority as there is always a risk of under-deterrence. This article examines the sanctioning scheme for anti-competitive conduct of trade associations to determine if the monetary penalty which in most cases is imposed on the basis of annual receipts, is adequate to create any 'general' or 'specific' deterrence.

[10] *In Re: Bengal Chemist and Druggist Association,* Suo moto Case No. 02 of 2012 and Ref. Case No. 01 of 2013.
[11] Competition Act 2002, §2(I)(5).
[12] Competition Act 2002, §3.
[13] Competition Act 2002, §3(3)(d).
[14] See, *Re: Air Cargo Agents Association of India, CCI Case No. 79 of 2012; In Re: Shivam Enterprises, CCI Case No. 43 of 2013.*
[15] OECD, *Competition Issues in Trade Associations*, Latin American Competition Forum, 2011, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2011)8&doclanguage=en, accessed on 14 March 2022.

III. ROLE OF TRADE ASSOCIATIONS IN CARTEL FORMATION

The trade associations can serve either as cartel facilitating structures or act as a cartel themselves. In an oligopolistic market, where the trade associations act as channels for the dissemination of sensitive information[16], it results in the reduction of competition.[17] Exchange of information related to cost, shipment details, sales data, discount and rebate plans, or information of credit, have served as ways to enable the cartel to survive and also attain stability. The platform of the association has been used to lobby, strategize and decide on the common behaviour, mostly initiated by the more influential members of the association. This reduces the dependency on a more direct form of coordination and thereby reducing the threat of detection. A trade association not only provides a platform for collusion and keeps a check on cheating members but also helps in reducing the cost of managing the cartel. There is a very high rate of involvement of trade associations among prosecuted cartel cases across jurisdictions.

Similarly, the decision of the trade association[18] in the form of recommendations, guidelines, voluntary standards,[19] code of conduct[20]/by-laws[21] or practice guidelines for the members results in fixation of prices directly or indirectly or a decision of the association to limit the production or share the market is bad in law.[22] Therefore, when the trade associations tried to determine the margins or profits of member distributors and retailers by fixing the upper ceiling of customer discounts[23] or fixed freight charges,[24] it was held to be bad in law. Similarly, the Commission, on

[16] CMA, Do's and Don'ts (2014), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358304/Trade_Association_dos_and_don_ts.pdf; Trade Association and Competition Act – Trade Association Dos and Don'ts, Government of Canada (2015), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03691.html.

[17] Collection and tabulation of information is one of the basic activities of a trade association. Such exercise is done for multiple reasons including development of strategy, identification of sectoral problems, as a lobbying tool etc. Sometimes, it is also done in sectors where the Government regulations mandate such a record keeping and submission of the same at a regular interval. However, exchange of commercially sensitive information which is generally kept to the individual firm in a competitive market creates problems. Such information exchange increases the likelihood of collusion. It can also bring transparency in the market to such an extent that competition is lessened.

[18] *See, Uniglobe Mod Travels Pvt. Ltd., v. Travel Agents Federation of India*, [2011] Comp LR 400 (Commission).

[19] *See, Automobiles Dealers Association, Hathras, UP v. Global Automobiles Ltd. and Pooja Expo India Pvt. Ltd.*, [2012] Comp LR 827 (Commission).

[20] *Dhanraj Pillay v. Hockey India*, [2013] Comp LR 543 (Commission).

[21] *Manju Tharad v. Eastern India Motion Pictures Association (EIMPA) and Others*, [2012] 110 CLA 136 (Commission).

[22] *Verband der Sachversicherer v. Kommission*, [1987] ECR 405.

[23] *Bengal Chemist and Druggist Association*, Suo moto Case No. 2/2012, decided on 11/3/2014 (Commission); *Varca Druggist & Chemist v. Chemist and Druggist Association, Goa*, 2012 Comp LR 838 (Commission).

[24] *Indian Foundation of Transport Research and Training v. All India Motor Transport Congress*, Case No. 61/2012, decided on 16/2/15 (Commission).); *In Re: Cochin Port Trust and Container Trailer Owners Coordination Committee*, Case No. 6/2014, decided on 1/8/17 (Commission).

multiple occasions, has objected to the practice of trade associations in form of refusal to supply[25], mandatory NOC[26], boycott[27], ban[28] or refusal to deal[29] with non-members of the association.[30] These practices were held to be restricting the supply or output of products or services in the market, thereby violating Section 3(3)(b) of the Act. The same has been held to be depriving consumer choice and creating barriers to entry in the market.[31] In more than 60% of cartel cases decided by the Commission, a trade association has been the primary cartelist or leader.[32]

IV. INDIAN EXPERIENCE WITH TRADE ASSOCIATIONS

In the last twelve years of the active enforcement of Indian competition law, the Commission has scrutinized the role of trade associations in facilitating cartels. In many cases, the platforms of the trade associations have been used to sustain and monitor cartels[33] by either facilitating exchange of commercially sensitive information between constituent members or providing a platform for active discussion on prices. A majority of cases under Section 3(3) of the Act involved the primary role of the trade associations having direct evidences of anti-competitive

[25] *FICCI Multiplex Association of India v. United Producers/Distributors Forum*, [2011] Comp LR 79 (Commission).
[26] *Maruti & Co., Bangalore v. Karnataka Chemist and Druggist Association (KCDA)*, Case No. 71/2013, decided on 28/7/16 (Commission).; *Rohit Medical Store v. Macleods Pharmaceuticals Limited*, [2015] Comp LR 451 (Commission).; *In re: Bengal Chemist & Druggist Association*, 2014 Comp LR 221 (Commission).; *The Belgaum District Chemists and Druggist Association v. Abbott India Ltd.*, C-175/09/DGIR/27/28-MRTP, decided on 2/3/17 (Commission).; *Reliance Agency v. Chemist and Druggist Association, Baroda*, case No. 97/2013, decided on 4/3/18 (Commission).; *Ghanshyam das Viz v. Bajaj Corp Ltd.*, Case No. 68/2013, decided on 12/10/15 (Commission).
[27] See, *TG Vinay Kumar Bharathim and Association of Malyalam Movie Artitsts (AMMA), Film Employees Federation of Kerala (FEFKA)*, Case No. 98/2014, decided on 24/3/17; *In Re: Kannada Grahakara Koota v. Karnataka Film Chamber of Commerce*, case No. 58/2012, decided on 24/3/17 (Commission).; *Sajjan Khaitan v. Eastern India Motion Picture Association*, 2012 Comp LR 914 (Commission).; *Cinemax India Ltd. v. Film Distributors Association*, 2015 Comp LR 81 (Commission).; *Uniglobe Mod Travels Pvt Ltd. v. Travel Agents Federation of India*, 2011 Comp LR 400 (Commission).
[28] *Kerala Cine Exhibitors Association v. Kerala Film Exhibitors Federation*, [2015] Comp LR 666 (Commission).
[29] *UTV v Software Communications Ltd., Mumbai v. Motion Pictures Association*, [2012] Comp LR 20 (Commission).
[30] *Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Ltd.*, [2015] Comp LR 232 (Commission).
[31] *Commission v. Co-ordination Committee of Artists and Technicians of WB Film and Television*, Civil Appeal No. 6691/2014 (SC).
[32] In contrast, in only 5 cases out of total of 36 cases (14%) under Section 26(6) had an allegation of primary involvement of trade associations.
[33] See, *Builders Association of India v. Cement Manufacturers' Association and Ors*. [2012] Comp LR 629 (Commission); *Cartelization in respect of zinc carbon dry cell batteries market in India v. Eveready Industries India Ltd & Ors.*, *Suo-Moto* Case No. 02/2016, decided on 19/4/18 (Commission).

behavior in the forms of diktats[34], notices[35]; by-laws[36]; letters of intent[37]; circulars; minutes of meetings or press releases and with an implicit threat for compliance. While in most cases, the executive bodies of the trade associations have been taking decisions on behalf of the members, there are also cases where general body meetings were called to make decisions.

Almost 60% of the cartel decisions of the Commission involved the behavior of limiting or controlling production majority of which were the result of decisions taken by sector-specific voluntary and powerful trade associations. Many of the cases are similar in nature and revolve around the questions of fixing margins, offering of discounts by retailers, the requirement of mandatory NOC or PIS, refusal to deal with non-members and boycotts for non-compliance.[38] Similarly, almost 50% of price-fixing cases – primarily in the pharmaceutical, transport or media sectors - involved the primary role of trade associations in the form of executing boycotts[39]; fixing the rate of revenue[40]/transport[41]/ freight charges[42]/commission[43] or fuel charges[44].

[34] See, *Swastik Stevedores Pvt. Ltd. v. Dumper Owners' Association* [2015] Comp LR 212 (Commission); *Varca Chemist and Druggist v. Chemist and Druggist Association, Goa*, [2012] Comp LR 838 (Commission); *Santuka Associates Pvt. Ltd. v. Al Indian Organization of Chemists and Druggists and Others*, [2013] Comp LR 223 (Commission).

[35] See, *Uniglobe Mod Travels Pvt. Ltd., v. Travel Agents Federation of India*, [2011] Comp LR 400 (Commission).

[36] See, *Manju Tharad v. Eastern India Motion Pictures Association (EIMPA) and Others*, [2012] 110 CLA 136 (Commission).

[37] See, *Automobiles Dealers Association, Hathras, UP v. Global Automobiles Ltd. and Pooja Expo India Pvt. Ltd.*, [2012] Comp LR 827 (Commission).

[38] *Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa*, MRTP C-127/2009/DGIR4/28, decided on 11/6/2012 (Commission); *In Re Bengal Chemist and Druggist Association*, Suo Moto Case No. 2/2012, decided on 11/3/2014 (Commission).; *Sudeep P.M. & others v. All Kerala Chemists and Druggists Association*, Case No. 54/2015, decided on 31/10/17 (Commission); *Reliance Agency v. Chemists and Druggists Association of Baroda & Others*, Case No. 97 of 2013, decided on 4/1/18 (Commission); *M/s. Alis Medical Agency v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (71/2014) *M/s. Stockwell Pharma v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (72/2014) *M/s. Apna Dawa Bazar v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (68/2015) *M/s. Reliance Medical Agency v. The Chemists & Druggists Association of Baroda & Others*, Case 65/2014, 71/2014, 72/2014 & 68/2015, decided on 12/7/18 (Commission).

[39] *M/s. FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Ors.,* RTPE 09/2008 (C-31/2009/DGIR) decided on 17/11/2011 (Commission).

[40] *FICCI – Multiplex Association of India v. United Producers/ Distributors Forum & Ors.,* Case No. 1/2009, decided on 25/5/2011 (Commission).

[41] *M/s Swastik Stevedores Private Limited v. M/s Dumper Owner's Association & Ors*., Case No. 42/2012decided on 21/1/15.

[42] *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh, President and Ors.,* Case No. 1/2012, decided on 16/2/15 (Commission). The COMPAT on 18/4/16 set aside the order of the Commission as the DG ignored replies from most of transport companies. Further, as per the Appellate Tribunal, there was not enough evidence to prove that there was diktat or directive from the association to increase prices. Rental was also noted to have not increased by 15% across board.

[43] *The Air Cargo Agents Association of India v. International Air Transport Association (IATA) & other*, Case No. 79/2012, decided on 04/06/2015 (Commission).

[44] *Express Industry Council of India v. Jet Airways (India) Ltd. & Others*, case 30 of 2013, decided on 7/3/18 (Commission).

Most of the anti-competitive behaviours originated from the diktats of the trade association and were enforced by virtue of their command and authority in the market. For this reason, the cartelized behaviours have not seen defections. There is always a credible threat of boycott for not towing the lines of the association[45] for those who indulge in the boycott, strike, picketing, non-supply or non-dealing with any insider who tries to go outside the terms of agreed behaviour. There seems to be a general acceptance within large trade associations for mutually accepted anti-competitive behaviours and they are passed off as market practice.

V. IMPOSITION OF PENALTY ON TRADE ASSOCIATIONS

Section 27 of the Act enables the Commission to direct an "*enterprise or association of enterprises or person or association of persons*" to discontinue a continued violation of Section 3 of the Act.[46] In addition, the Commission under Section 27(b) may impose a penalty *to a maximum of ten percent of the average of the turnover for the last three preceding financial years, upon each of such person(s).* Within the upper limit fixed under Section 27(b), the Commission can impose a penalty either on the basis of profit or on the basis of turnover, taking into account the duration of the cartel. Section 27(b) or the proviso is silent on the imposition of penalty on trade associations. The Commission has interpreted the provision to impose a penalty on the trade associations in a similar manner to firms involved in cartelization: for instance, the Commission in Eros International[47] observed:

> *"7.3 As per the provisions of Section 27(b), penalties for anti-competitive agreements are to be imposed either on turnover or profit. Since the associations are not having turnover of their own out of exploitation of the activities of film distribution and exhibition and are having receipts from members besides some other miscellaneous income and also considering that the associations represent the collective intent of the members and the decisions of the associations are having anti-competitive effects on the market, the Commission finds it appropriate to impose penalties on receipts/income of these associations."*

[45] See, *Vijay Gupta v. M/s Paper Merchants Association, Delhi*, Case No. 7/2010, decided on 3/2011 (Commission).
[46] Competition Act (2002), §27(a).
[47] *Eros International Media Ltd. v. Central Circuit Cine Association, Indore & Ors.,* Case 52/2010; Case 56/2010, 2012 (CCI).

Over the years, the Commission has consistently imposed penalties on associations by way of Section 27(b).[48] Since these trade associations did not have an actual turnover (since most of these trade associations were not 'enterprises' and were not doing an economic activity on their own), the computation has been done on the basis of annual receipts which majorly constitute contribution by the members i.e., membership fees. Further, in the majority of cases where the decision(s)/practice(s) of trade associations were held to be anti-competitive, the Commission has imposed a penalty at the rate of 10% i.e., at the upper ceiling level. The presence of aggravating[49] or mitigating factors did not alter the quantum of penalty imposed on the trade associations by the Commission. While logically speaking, the presence of aggravating factors should increase the quantum of penalty. However, the same is not seen in many cases decided by the Commission.[50] Similarly, the Commission penalized associations at the same rate in case of repeated violations (recidivism). On very limited occasions, the Commission has reduced the penalty on the trade associations from the general rate of 10%.[51] It is to be noted that Section 27 does not mention the term 'receipts' and therefore is silent on the imposition of fines on trade associations acting as cartels themselves. The imposition of a fine at a flat rate of 10% meant that Commission could not exceed the percentage even in cases where there were one or more aggravating factors. Cases against trade associations as seen in matters of *Santuka*[52], *Arora*[53], *Reliance*[54], *BCDA*[55], *CDA* etc. are evidence of such a problem.

A. Recidivism

European Commission defines recidivism in its 2006 Fining Guidelines[56] as the situation "where an undertaking continues or repeats the same or similar infringement after the Commission or a

[48] See, *In re: M/s Cinergy Independent Film Services Pvt. Ltd.*, Case No. 56/2011, order dated 10/1/2013 (CCI); *Mr. Nadie Jauhri v. Jalgaon District Medicine Dealers Association (JDMDA)*, Case 61/2015, order dated 20/6/2019 (CCI); *In Re: Madhya Pradesh Chemists and Distributors Federation (MPCDF)*, Case 64/2014, order dated 3/6/2019 (CCI); *In Re: Vedanta Bio Sciences, Vadodara*, Case No. C-87/2009/DGIR, order dated 15/1/2019 (CCI).
[49] See, *In re: M/s Arora Medical Hall, Ferozepur*, Case No. 60/2012, order dated 5/2/2014 (Commission).
[50] See, *M/s Arora Medical Hall, Ferozepur v. Chemists &Druggists Association*, Case No. 60/2012, decided on 5/2/2014 (Commission).; *In Re: Bengal Chemist and Druggist Association*, Suo moto Case No. 02 of 2012, decided on 11/3/2014 (Commission).
[51] *In Re: Kerala Cine Exhibitors Association*, Case No. 45/2012, order dated 23/6/2015.
[52] *M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists*, Case No. 20/2011, decided on 19/2/2013 (Commission).
[53] *M/s Arora Medical Hall, Ferozepur v. Chemists &Druggists Association*, Case No. 60/2012, decided on 5/2/2014 (Commission).
[54] *Reliance Agency v. Chemists and Druggists Association of Baroda (CDAB) & Others*, Case No. 97 of 2013, decided on 4/1/2018 (Commission).
[55] *In Re: Bengal Chemist and Druggist Association*, Suo moto Case No. 02 of 2012, decided on 11/3/2014 (Commission).
[56] Para 28(a), Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02, Official Journal of the European Union (2006).

national competition authority has made a finding that the undertaking infringed Articles 101 or 102 of the Treaty of Functioning European Union (TFEU)". Recidivism in the Fining Guidelines is considered an aggravating factor that increases the base amount of the fine up to 100% for each such infringement established. A higher rate of recidivism raises questions about the deterrent effect of a previously imposed fine.[57] In India, there have been many cases where sector-specific associations have indulged in anti-competitive behaviour of a similar nature.[58] The Commission has on multiple occasions lamented about the repeated nature of the violation, especially among the trade associations in the pharmaceutical sector. However, the Commission has not gone beyond penalizing trade associations at a rate of 10%. For instance, the Commission penalized the *Chemist and Druggist Association, Goa* ["**CDAG**"] in 2012 at the rate of 10% of average receipts.[59] In 2014, the Commission observed that the CDAG continued with the anti-competitive behaviour with *"utmost disrespect to the Commission's mandate"*.[60] However, it only imposed a penalty at the rate of 10% of the average receipts. Similarly, the Commission in its 2015[61] order against Himachal Pradesh State Chemists & Druggists Association noted the previous orders against the association by MRTPC in 2008 and ended up penalizing the association at the same rate of 10% on the association.[62] A similar scenario is seen in the matter of the *Indian Foundation of Transport Research & Training*[63] and the *Kerala Film Exhibitors Federation ["**KFEF**"]*[64]. In *Kannada Grahakara Koota*[65], the Karnataka Film Chamber of Commerce ["**KFCC**"] was penalized at the rate of 10% of average income even after the Commission noted the prior sanctions imposed on it on two previous occasions. While some jurisdictions prescribe an increase in the quantum of penalty in case of repeated violations, the Commission has found itself

[57] The European Commission in the *Michelin* case remarked, "Recidivism is a circumstance which justifies a significant increase in the basic amount of fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent". Judgment of the European Court of Justice, Case C-322/81 *NV Nederlandsche Banden industrie Michelin v. Commission*, (1983) ECR 3461.

[58] *Reliance Agency v. Chemists and Druggists Association of Baroda & Others*, Case No. 97/ 2013, decided on 4/1/18 (Commission); *M/s Maruti & Company v. Karnataka Chemists & Druggists Association & Others*, Case No. 71/2013, order dated 28/7/2016 (Commission); *Sudeep P.M.& others v. All Kerala Chemists and Druggists Association*, Case No. 54/2015, decided on 31/10/17 (Commission).

[59] *Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa,* Case No. MRTP C-127/2009/DGIR4/28, decided on 11/6/2012 (Commission).

[60] *In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.,* Suo-Moto Case No. 05 of 2013, decided on 27/10/14 (Commission).

[61] *M/s Rohit Medical Store v. Macleods Pharmaceutical Limited & Others,* Case No. 78 of 2012, decided on 29/1/2015 (Commission).

[62] *See also, Mr. P. K. Krishnan v. All Kerala Chemists and Druggist Association & Ors.,* Case No. 28 of 2014, decided on 1/12/2015; *Madhya Pradesh Chemists and Distributors Federation (MPCDF) v. Madhya Pradesh Chemist and Druggist Association (MPCDA) & Ors.*, Case No. 64/2014, decided on 15/1/2019 (Commission).

[63] *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh, President and Ors.,* Case No. 61 of 2012, decided on 16/2/2015 (Commission).

[64] *M/s. Crown Theatre v. Kerala Film Exhibitors Federation (KFEF),* Case No. 16 of 2014, decided on 8/9/2015.

[65] *Kannada Grahakara Koota v. Karnataka Film Chamber of Commerce (KFCC) & Ors.,* Case No. 58 of 2012, order dated 27/7/2015 (Commission).

limited in its ability to impose a penalty at a higher rate due to the upper-capping provision. The Commission has not utilized Section 27(g) either to impose additional restrictions.

B. Failure to identify ring leaders

The Commission, over the years, has not made the effort of identifying cartel ring leaders even while assessing leniency applications.[66] In cases where the trade associations acted as cartels themselves, the Commission has imposed penalties on the basis of annual receipts. In some cases, the Commission has also imposed a penalty on the office bearers or the executive members of the association, quantified on the basis of their respective salaries.

The Commission does not seem to consider that even when the decision is taken by the trade association through the executive committee/members, there are certain 'undertakings' or 'enterprises' within the association that assume the leadership role and guide the decision-making process. The non-identification of these ring leaders helps the real culprits escape liability. Many jurisdictions, in order to create a higher level of deterrence, treat the cartel ring leaders differently from other cartel participants. These ring leaders can act as initiators, instigators and even coercers in specific circumstances. Therefore, in order to create some level of fear, competition law in many countries either prescribes a higher penalty for ring leaders when compared to other cartel participants or excludes them from leniency.[67] Considering that the membership of trade associations is comprised of business undertakings, it would have been worthwhile for the Commission to identify the leader firm behind the decision making of the association. The Apex Court has recognized 'leadership' as one of the factors to compute penalty.[68] The non-identification of ring leaders fails to create 'specific deterrence' for individual undertakings. Moreover, this loophole can encourage the potential ring leaders to encourage/coerce cartelisation in their respective industries and then seek leniency at the first sign of investigation by the Commission.

[66] See, *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items,* Suo Moto Case No. 3/2014, order dated 18/1/2017 (Commission).
[67] See, Para B(e)**,** *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases***,** *Official Journal C 207, 18/07/1996 P. 0004 – 0006,*European Commission; Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases**,** *Official Journal C 045 , 19/02/2002 P. 0003 – 0005,* European Commission.
[68] Para 13, *Per* N.V. Ramana, J., *Excel Crop. Care Limited v. Competition Commission of India and Ors.,* AIR 2017 SC 2734.

VI. LIFTING THE 'VEIL OF ASSOCIATION'

Since most of the trade associations are not themselves engaged in any commercial activity, the turnover of the association is primarily composed of membership fees and is therefore very low. This further raises questions about the deterrence effect for the association in question and towards other associations indulging in practices which are violative of competition law. Additionally, the administrative fine calculated on that basis of turnover limited to membership fees has no relation whatsoever to the actual impact on the market of the illegal behaviour. Some competition authorities,[69] therefore, lift the 'veil of association' to calculate fines on the basis of the turnover of the constituent members. For instance, in cases where the infringement of an association relates to the activities of its members, Article 23(2) of the European Council Regulations ["**ECR**"][70] allows the European Commission ["**EC**"] to impose a penalty on the association based on the sum of the total turnover of each member active on the market affected by the infringement of the association. And, if the association is not solvent, the association will call for contributions from its members to cover the amount of the fine.[71] This has also been incorporated in the European Guidelines on the method of setting fines, 2006.[72] Article 26(4) also ensures that the contributions from the constituent members are done within a time frame failing which, *"it may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association"*[73]. The undertakings will not be required to pay if they are able to prove that they did not implement the anti-competitive decision of the association or *"were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case"*[74].

The Commission while penalizing the constituent members of the association may consider the relative size of the undertakings belonging to the association and, in particular, the situation of small and medium-sized enterprises.

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[69] *Potential pro-competitive and anti-competitive aspects of Trade/Business Associations*, Policy Roundtables, OECD (2007), DAF/COMP (2007)45, (July 2020) http://www.oecd.org/regreform/sectors/41646059.pdf.
[70] Art. 23(2), Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001.
[71] Article 23(4), Id.
[72] See, Cl. 13 read with Cl. 14 and cl. 33, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).
[73] Art. 23(4), Id.
[74] Para 4, Id.

When a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with a deterrent effect can be determined.[75] It is not necessary that the members of the association should have actually participated in the infringement, but the association must, by virtue of its internal rules, have been able to bind its members.'[76] The European courts have on different occasions emphasized the correctness of this view and noted that *"the influence which an association of undertakings has been able to exert on the market does not depend on its own turnover, which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power."*[77]

The ECJ through its judgment in *Coop de France and FNSEA and Others v. Commission, ECJ (Third Chamber)*[78] (Coop de France) was a breakthrough in terms of piercing the veil of association to impose fines on constituent undertakings for violations of EC competition law.[79] The alleged violation was a crisis cartel with an agreement to suspend imports of beef entered into between federations representing beef farmers and those representing the slaughterers.[80] The Court held that the turnover of constituent members of associations could be considered even if it was not within the formal powers of the associations to bind their members.[81] Fixing liability on the basis of turnover of constituent members has two justifications. Firstly, in determining the penalty, the influence of the offender's undertaking on the market in terms of its size and

[75] Joined Cases 100/80 to 103/80 *Musique Diffusion française and others* v *Commission,* [1983] ECR 1825, para120 and 121.
[76] Case C-298/98 P, *Finnboard* v *Commission.*
[77] (Case C-298/98 *P, Metsä-Serla Sales Oy v. Commission*, [2000] ECR I-10157, para 12 and para 62-74). See also Joined Cases T-39/92 and T-40/92, *CB and Europay v. Commission*, [1994] ECR II-49, and Case T-29/92, *SPO and Others v. Commission*, [1995] ECR II-289; Joined Cases T-213/95 and T18/96, *SCK and FCK v. Commission*, [1997] ECR II-1739; Case T-338/94, *Metsä-Serla Sales Oy v. Commission*, [1998] ECR II-1617.
[78] *Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others*, ECJ (Third Chamber), judgment of 18 December 2008, C-101/07 P and C-110/07 P.
[79] Florence Alexandr Svetlicnii, *Piercing the Corporate Veil: Imposition of Fines on Associations of Undertakings for Violation of EC Competition Law*, ELR 3, 2009.
[80] Tjarda van der Vijver, The French beef case: Coop de France Betail et Viande v. Commission of the European Communities, 30 Eur. Compet. Law Rev., 2009.
[81] The Court distinguished the facts from those in *Finnboard* v. *Commission*, ECJ [2000] ECR I-10157 by remarking that the members of the association took an active role in the anti-competitive agreement and hence, it did not matter if the association had powers to bind its members or not. Contrastingly, the members of the association were not participating in the infringement in the case of Finnboard and hence, the condition of the association binding its members was a prerequisite to be able to impose fines on the basis of the constituent members' turnovers. Further, the anti-competitive practices under consideration were undertaken by the association for the direct benefits of its members, given how the objectives and the interests of the association were not independent of those of its constituent members.

economic power has to be accounted for. Second, penalties will have a dissuasive effect only when the turnover of constituent members is taken into account.[82]

Another argument in favour of lifting the veil of the association is to prevent indirect penalty on innocent members of the association which has engaged in cartelisation. It has been seen in several cases that while the association in question has indulged in cartelisation, not all its members were party to such cartel conspiracy.[83] In such situations, the penalty on the association leads to an indirect penalty on the member who had never participated in the cartel conspiracy and may not even be aware of the same.

VII. CONCLUSION

Fines should have a sufficient deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in or continuing, behaviour that is contrary to competition law (general deterrence). Fines imposed on an association therefore should be proportionate in relation to the economic influence it deploys on the market, thereby safeguarding the effectiveness of fines as a means to suppress illegal activities and prevent their reoccurrence. At the same time, justice requires that innocent enterprises should not be punished merely because they are members of an association which may have indulged in cartelisation without the knowledge of such enterprise. Both the objectives can be achieved under competition law by lifting the veil and assessing the actual cartel participants and their ring leaders.

[82] See, *Musique Diffusion and others v. Commission* [1983] ECJ 1825.
[83] See, Case No. 29 of 2010, Ref. Case No. 08 of 2013, Suo Moto Case No. 02 of 2016.

BIG TECH GIANTS: EXCURSION FROM DEMOCRACY TO DICTATORSHIP

- *MS. RADHIKA GUPTA AND MS. NIKITA PARIHAR*[*]

ABSTRACT

Every once in a while, we come across this time where Instagram, Facebook, and literally every social media site knows exactly what's going on in our minds. Be it the perfume you were talking about or the scrolling dresses. Their algorithms have figured it all out, and in one of those moments you scroll and the exact product is bombarded on your social media handles, that's the very moment when you should be acquainted with the fact that you are being monitored. Your data footprints are being traded and used for profits generated from advertising and marketing. These big tech giants have not only used your data for gains but have also created a dominant position in the digital economy, which has created a dependency of other entities on these giants, which is a direct threat to our competition-driven economy. There are concerns as these giants are crippling competition and threatening democracy globally. This paper aims to analyze what powers big tech possesses, what governments have planned to do with big techs, how they affect us, and some possible solutions and regulations.

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I. INTRODUCTION

The biggest tech companies are wielding a lot of power these days. These are some of the most valuable companies globally, but it's easy to forget how quickly and meteorically they had risen globally. Big tech companies refer to those four or five companies dominating the market and are the most prestigious companies in the information technology sector in the world. These four companies include Alphabet (Google), Amazon, Facebook, Apple, popularly known as (GAFA) – and Microsoft, adding to this list. These companies are dominant players in their respective fields, namely e-commerce, online advertising, cloud computing, Artificial intelligence, social networking, etc. While Facebook, Google, and Amazon were founded after 1994, other fellow giants like Microsoft and Apple seem to be around us forever, founded in the mid-1970s.

As money brings power, this breed of global leaders has much more than money or power; they have our data, the most valuable asset today. Data is relatively a new commodity. The rise of technology has given these companies unprecedented information about us, giving them an unfair advantage to create a monopoly by eliminating the competition unjustly. As per a report by StatCounter, Google owns 90% of the total search engine market share[84], which is humongous. Shifting online has broadened the horizon for these tech giants. They have acquired enough market to run the digital economy as per their whims which may be disastrous. Among the growing concerns, the target question is whether these companies can responsibly handle our data and they take up their liability amenably.

Regulations regarding Data protection bills have been introduced in many countries and in a few countries, it is still in progress. India along with many other countries has realized the importance of regulating these big tech giants and, therefore, making stringent laws and regulations in this aspect. The immense control of cyberspace stays broadly a limited group of tech giants running the digital ecosystem, which has given them tremendous power in different spheres. India doesn't have any explicit laws to protect personal data and therefore, it is the necessity of the time to have some definite laws governing these privacy issues.

[1] 'Search Engine Market Share Worldwide' (StatCounter Global Stats, 2022) <https://gs.statcounter.com/search-engine-market-share>accessed 25 January 2022.

II. POWERS POSSESSED BY BIG TECH GIANTS IN DIFFERENT SPHERES

A. Economic Sphere

The big tech companies, including GAFA, have become so puissant that they have gained a lot more leeway in so many spheres of the inequitable market. The first and foremost sphere in which these giants have gained a competitive advantage over all other companies is the economic sphere. These companies facilitate a platform for suppliers and consumers to concatenate. The facilitation includes connectivity among advertisers- social networking sites, app developer-device owner, vendor- online shoppers, etc. Because of this direct connectivity, more and more customers get captivated by these kinds of big tech companies, which are in the estimations of these companies.

During this process, as their customer base is broad and the customer indulges in many activities with these companies, they get essential information of consumers like their preferences, taste, behaviour, etc. by using which they manufacture or customize their products and services, which provides a competitive and unfair edge to them over all other competitors in the market. As a result, these big tech giants become lawmakers and trendsetters for their competitors.

Moreover, these companies disrupt traditional businesses with the help of their physical infrastructure. For instance, Facebook by inducing a virtual currency named "Diem" (formerly libra), the token which was initially intended to be the universal currency in the basket of sovereign currencies like the U.S dollar and euro.[85] But had made digital currency market volatility unending and, they can even make more digital and cryptocurrencies like this shortly.

B. Technological Sphere

The second power which big tech giants retain is in the technological sphere. They have started administering social and political processes using their powerful algorithms. Has anyone ever wondered that whatever apps or websites people are using for political purposes can be designed by private companies that can take advantage of that and control the whole process? This can be grievous for any economy and can pose a question mark on democracy. For instance, in the USA,

[2] Editorial, 'Facebook Diem (Formerly Libra) Price Today, Diem to USD Live, Market Cap and Chart' (*CoinMarketCap*) <https://coinmarketcap.com/currencies/facebook-libra/> accessed 25 January 2022.

the vote-by-mail process and consumer product designing are done by these big tech giants as they are designed and controlled by these companies only, which automatically puts these companies on upper footing as they can create them as per their boons, whims and fancies without considering the market, competition, etc.

Whatever we do, wherever we go, we will eventually use technology created by any of the GAFA companies, be it Google maps, Instagram, or WhatsApp, which is owned by Facebook, Amazon, which includes its AI products, Audiobooks, Cloud services, and other services, which are extremely powerful even more than any government. Amazon has a plane and drone fleet. It's Amazon's version of delivery, implying that the company is responsible for much of the physical environment around them.[86] Not only one firm, but these four companies have encircled the globe, thus blanketing the entire society in their ineluctable technology.

C. Political Sphere

The political sphere is crucial for any country, directly impacting the economy. Big techs even govern this sphere of countries by lobbying heavily with the political leaders and parties with their erroneous financial power to maintain their dominance over the nations as by doing this, they can easily escape from legal liabilities and compulsions which would otherwise create hurdles for them to enter and establish dominance in the country. According to the New Statesman's report, the technology sector is the fourth highest lobbying sector. They spent 436 million dollars in political lobbying in the year 2020.[87]

These big tech giants threaten and clout the democracy of countries by using political power and harnessing the media to influence news and reports by singling out which information will be shown and which will be suppressed to be more privileged. To put it in other words, these big companies have a nexus with media platforms and influence them according to their needs. With the help of their economic minds, the big tech giants have entered the political arena. Recently, Steve Sisolak, the governor of Nevada, has proposed a plan to establish "Innovation Zones" to attract new investments. As per this idea, these big tech giants can form their local Government,

[3]Associated Press, 'Amazon's Delivery Drones: An Idea that May Not Fly', (*Business Today*, 04 December 2013) <https://www.businesstoday.in/technology/news/story/amazon-delivery-drones-will-it-work-42819-2013-12-04> accessed 1 June 2022.

[4] Katharine Swindells, 'Revealed: The Army of Big Tech Lobbyists Targeting Capitol Hill' The NewStatesman UK Edition, (*15 February*, 2021) <https://www.newstatesman.com/business/companies/2021/02/revealed-army-big-tech-lobbyists-targeting-capitol-hill> accessed 25 January 2022.

which will be governed by themselves and can create laws, taxation regulations, governance systems, etc. which will increase the power of these companies as they will stand directly with the Government resulting in even more abuse of the law, Government, and competition.[88] If the Government's policies will not favour these companies, they might leak the unpublished price-sensitive information, which can be dangerous for any economy.

III. WHY GAFA IS A CONCERN FOR COUNTRIES ALL OVER THE GLOBE?

A. Privacy Concerns

As the big tech giants are already facing the heat of the Government globally, it has become inevitable to be ignorant of how these companies are breaching our privacy and personal data and, as a customer and regular users, how it can impact our lives. On a daily basis, we are using services furnished by these companies. It is pretty inescapable not to use their services as they have racked up their ecosystem around us in which we have stepped in but now can't step out as we are so contingent on these technologies for everything. It all surrounds us, we use it to communicate, get information, acquire knowledge, buy things, or even when we are in our own space with our mobile phones. There have been enormous instances when these companies have breached our data and even been charged for it. In 2019 there was a massive data breach of over 533 million users whose personal information was posted online[89,] and that's not the only instance, Cambridge Analytica breached the data of 50 million users. This data analytics firm was working with Donald Trump in presidential campaigns. The unauthorized data here was used to manipulate the ballot box choice and was divulged later how the firm used the data harvested from Facebook to influence millions of people in the presidential campaign this was a case that directly threatened democracy.[90] The question here is whether Facebook was exploited or was its full-fledged planned trading done by Facebook willingly to generate more profits?[91] The answers

[5] Katya Maruri, 'Nevada Governor Pulls Controversial Innovation Zone Bill' (*GovTech*, 04 June 2021) <https://www.govtech.com/smart-cities/nevada-governor-pulls-controversial-innovation-zone-bill> accessed 25 January 2022.

[6] Editorial, 'Facebook Data Breach Explained: What Implications Does It Have on the End User?' (*The Economic Times*, 13 April 2021) <https://economictimes.indiatimes.com/news/india/facebook-data-breach-explained-what-implications-does-it-have-on-the-end-user/videoshow/82044094.cms> accessed 25 January 2022.

[7] Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach', (*The Guardian*, 17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 1 June 2022.

[8] Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' (*The Guardian International Edition*, 17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 25 January 2022.

remain well-hidden as these companies escaped and were sometimes charged with fines even after multiple forfeits.

We have perceived various instances of these companies harnessing our data and manipulating our minds. This is violating and exploiting our rights and liberty they are controlling the customer's minds and using them as per their whims. These companies have compromised the personal data of millions of users; however, they have always defended the allegations and used their arms to elude accountability. We cannot expect these big tech giants to be benevolent as they are more engrossed in profits which can be anticipated by the hike in their stock prices even when the world was juggling with the pandemic; these companies' stocks prices skyrocketed when other businesses were shutting down due to lockdown caused by COVID-19 Pandemic when the whole economy was moving downwards as people were restricted to their home and were doing everything virtually, most of the economic activities halted, millions of people lost jobs, GDP contracted globally in spite of all that these tech giants became more gigantic.

B. Taxation Aspect

Tax is something which helps in the functioning of a country which every individual and company pay as per regulation laid by the laws in that particular country, and when we talk about tech giants, they have been engaged too long to take advantage of the loopholes of the system to evade and escape from tax liabilities. It has concerned many countries as these tech giants are de routing themselves through developing nations like India to avoid their tax liabilities. The silicon six (Facebook, Apple, Amazon, Netflix, Google, and Microsoft) were accused of invading approximate $100 billion of tax globally for over a decade from 2011 to 2020, and the amount itself charts the ferocity of the manipulating power they have in the market [92] which is the hideous reality behind the success of these companies. Tech giants have made low-tax countries like Luxemburg, Bermuda, and Ireland their base and have absconded their tax liabilities in the United States of America (USA).[93]

[9] 'Silicon Six End the Decade with $100 Billion Tax Shortfall' (*Fair Tax Foundation*, 31 May 2021) <https://fairtaxmark.net/silicon-six-end-the-decade-with-100-billion-tax-shortfall/> accessed 25 January 2022.
[10] Chloe Taylor, 'Silicon Valley Giants Accused of Avoiding Over $100 Billion in Taxes Over the Last Decade', (*CNBC*, 02 December 2019) <https://www.cnbc.com/2019/12/02/silicon-valley-giants-accused-of-avoiding-100-billion-in-taxes.html> accessed 1 June 2022.

Apple recently hit a 3 trillion market, making it the first company with this huge market cap.[94] These companies are not only endlessly creating profits by dominating the market globally but are also burglarizing the money of the country by not paying the tax amount which they should, which is another problem which these companies are creating for the global economy, they are constantly empowering themselves in the digital world and impacting lives of millions of people globally, they are now not confined to the United States (US) where they were originated, but now, they have worldwide existence with ensconced monopoly.

C. Anti-Trust Abuse

As seen in recent years, these tech giants are now facing a plethora of regulations and proceedings brought up against them for their anti-competitive strategies and competition-killing approach. Since its inception, Facebook has been involved in numerous acquisitions which started from the year 2007 when it made its first-ever acquisition by taking over Parakey[95] and ever since then, it has been in news headlines for acquisitions of booming companies and its biggest competitors like Instagram and WhatsApp with mammoth amounts. The most significant disadvantage other entities have is that two primary digital distribution services are owned by Google & Apple and no entity can enter without their approval and terms, Apple hurts the businesses by restricting them from using their in-app purchase system and creating its dominance, on the other hand, Google has also entered in extorting commissions from the apps listing on Google play store. The commission of up to 30% is charged from the apps however Google has defended this move by stating that it is restricted to only some kinds of apps also most of the apps are already using Google pay services so it won't affect them. Two of the most dominant companies in the smartphone market i.e., Google and Apple decide on which app will stay on their digital service-providing store and the criteria for taking them down which is creating threats to its competitors and the market. In 2020 Paytm, one of the biggest competitors of Google Payments, was taken down by Google from the play store for violating rules replying to which Paytm alleged that Google is restricting its services and acquisition of new users and that intensified the amount of power these companies have.

[11] Nivedita Balu & Noel Randewich, 'Apple Becomes First Company to Hit $3 Trillion Market Cap, then Slips', (*The Economic Times*, 4 January 2022) <https://economictimes.indiatimes.com/tech/technology/apple-becomes-first-company-to-hit-3-trillion-market-cap-then-slips/articleshow/88679454.cms> accessed 1 June 2022.

[12] The Associated Press (ed), 'Facebook Buys Startup Parakey' (*CBC News*, 20 July 2007) <https://www.cbc.ca/news/science/facebook-buys-startup-parakey-1.686171> accessed 25 January 2022.

Professor Jack Fontanel of the University of Grenoble Alpes has classified these giants as progressive and dangerous to human civilization. He also called these giants "quasi-monopoly" Domination.[96]

D. Whose Liability, Is It?

Liability starts with the long-asked question of who's responsible for what's being done on the platforms owned by these big tech giants?

In his European Union testimony, CEO of Facebook Mark Zuckerberg said that they were liable for the protection of data of their users after a massive data breach in Cambridge Analytica Scandal,[97] but are they concerned about it because now a customer needs to protect himself from these companies as they use personal data for soaring profits? Another aspect is when any fake or unlawful material is posted on these platforms whose responsibility is it to make that good? We can classify liability in two ways: when personal data is transferred or unauthorized access is given to a third party and second when any illegal or unlawful content is posted on these platforms.

Two years before the Cambridge Analytica scandal Facebook signed a deal that immunized it from Federal Trade Commission (FTC) fines for breaches for the time before June 2019, if the scandal was done after that time Facebook could have faced action for the infringement[98] this tells us how these companies can even escape the liability by signing the deal with the authorized body itself. In the scandal, Facebook alleged that it was an unauthorized act done and was not a data breach if it had been a data breach Facebook should have taken up the liability but, in the scandal, it was an unauthorized act done by the people which relatively protected Facebook from the liability.

The second type is when illicit data or content is posted from the user accounts on these platforms in such cases the user is made liable if negligence is established and if he fails to prove that there was any hack or unauthorized use of his account. These social media intermediaries were

[13] Cf Cadwalladr (n 6).
[14] Ian Sherr, 'Facebook, Cambridge Analytica, Data Mining and Trump: What You Need to Know' (*CNET*, 18 April 2018) <https://www.cnet.com/news/facebook-cambridge-analytica-data-mining-and-trump-what-you-need-to-know/> accessed 25 January 2022.
[15] Charlotte Jee, 'What You Need to Know About the Facebook Data Leak' (*MIT Technology Review*, 7 April 2021) <https://www.technologyreview.com/2021/04/07/1021892/facebook-data-leak/> accessed 25 January 2022.

provided harbour protection under section 11[99] as these intermediaries do not have complete control over the content posted on these platforms by their users which is also highlighted in the new Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021[100] in India.

IV. GAFA AS AN INTERNATIONAL THREAT: FROM LIBERALIZATION TO REGULATION

Competition is good because companies keep innovating, producing better products, and competing to attract more customers, ultimately benefiting the customers. But the problem lies when only a few companies hold the majority of the market share and that too by killing its competing startups and companies. The countries have given these big techs ample power and autonomy as they were appreciated for contributing to the growth and development of the country. But now, these companies' frauds and scams got unwrapped, which are broadly related to breaches of data privacy and antitrust abuse. Countries have liberalised them so much that they have started blackmailing the Government. Therefore, it is now time to make stringent laws and regulate these companies as not controlling them will eventually lead to disruption of competition from the market.

A. Action Taken By the USA

In 1998, for the first time, a lawsuit was instituted against Microsoft for using its dominant position in the market to abuse its competitors. The judgment was passed by judges using the Sherman Act, 1890.[101] Still, there was no control and regulation on the activities of these big tech companies. Even, the USA always backed these big tech giants and has always used a liberalized approach while dealing with them. Barack Obama threw his trust in technology in 2008, which led him to deliver his presidency. There was some skepticism by government agencies, but Facebook and Google were still given autonomy to run their course without any interference from the Government. In 2011, FTC settled the charges against Google for alleged deceptive devices

[16] Information Technology Act 2000, s 11.

[17] 'Notification dated, the 25th February, 2021 G.S.R. 139(E): the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (*Ministry of Electronics and Information Technology, Government of India*, 25 February 2021) <https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary> accessed 25 January 2022.

[18] 'Justice Department Files Antitrust Suit Against Microsoft for Unlawfully Monopolizing Computer Software Markets' (*Department of Justice*, 18 May 1998) <https://www.justice.gov/archive/atr/public/press_releases/1998/1764.htm> accessed 25 January 2022.

and breaching data privacy.[102] After a year, FTC also settles with Facebook for misleading users about using their data.[103] The 2012 elections in the USA were primarily based on technical devices designed by Amazon web.

By the middle of the decade, the concerns regarding tech industries were starting to bubble up. The white house began ensuring fair competition hampered by these big tech giants. Council of Economic Advisors released an issue brief suggesting, "Regulators may wish to assess whether this "big data" is a key resource, as new entrants may struggle to sell to or otherwise attract customers without it."[104] In September 2019, Attorney Generals for all states launched an investigation against Google and Facebook for creating a monopoly in the market.[105] On the other hand, FTC has started investigating Amazon and Facebook for illegally maintaining social networking monopoly and anti-competitive conduct.[106] In October 2020, the US House Judiciary has concluded that these big tech giants, including Google, Apple, Microsoft, etc., have gained so much power that they are leading the destruction of the American economy through political speech censoring, fake news spread, etc. For regulating these big tech giants, US Congress recently has passed various antitrust laws under which the big companies will not be able to sell their products on their websites so that all other competitors get equal opportunity, for example, Amazon and Apple won't be able to sell their Amazon basic and Apple music respectively on their platforms.

B. Action Taken By Other Countries

Along with the US, other countries have also started taking action against these big tech companies for ensuring their regulation in their respective countries. In 2017, the European Union

[19] 'FTC Charges Deceptive Privacy Practices in Googles Rollout of its Buzz Social Network' (*Federal Trade Commission*, 30 March 2011) <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz> accessed 25 January 2022.

[20] 'FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook' Federal Trade Commission, 24 July 2019 <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions> accessed 25 January 2022.

[21] 'Benefits of Competition and Indicators of Market Power' (*Obama White House*, May 2016) <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf> accessed 25 January 2022.

[22] 'AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations' (*Texas Attorney General*, 16 December 2020) <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive> accessed 25 January 2022.

[23] 'FTC Sues Facebook for Illegal Monopolization' (*Federal Trade Commission*, 9 December 2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 25 January 2022.

launched an antitrust lawsuit against Google for anti-competitive practices. The European Commission has charged them with a penalty of 2.4 billion euros.[107] The EU has also addressed monopoly concerns through the "Digital service and Digital Markets Act" under which these companies were held liable for content on their platforms, and for its non-compliance they will be penalized up to 10%. On the other hand, on 1st January 2019, France became the first country to impose GAFA Tax.[108] As per this legislation, a 3% digital tax has been imposed on these companies operating in France. Similarly, the United Kingdom (UK) has directed big tech giants to remove harmful and illegal content from their website; non-compliance will result in a penalty of £18 million ($24 million) or 10% of their annual global revenues, whichever is higher.[109] Australia in the direction of regulating these companies has investigated advertisement practices of Google and Facebook in 2018, findings of which were that on every $100 online advertisement, Google and Facebook acquire $53 and $28 respectively, and the remaining was allocated among other companies. For removing this revenue imbalance, Australia has introduced the "News media and Digital Platforms mandatory bargaining Code", which mandates that digital companies to share their revenue with local news agencies.[110]

C. Response of Big Tech Giants

In response to these accusations, companies have maintained a diplomatic silence. They have hardly taken any steps to change the current scenario. These big tech giants face constant and heated competition from new, existing, and established companies. Google in its defense has taken a stand that even though it is the most used search engine, still 50% of Americans use Amazon for searching their product.[111] Similarly, Facebook has said that they are getting stiff

[24] James Vincent, 'Google Loses Key Appeal Against €2.4 Billion EU Shopping Antitrust Case' (*The Verge*, 10 November 2021) <https://www.theverge.com/2021/11/10/22769823/google-eu-antitrust-shopping-comparison-loses-appeal#:~:text=The%20EU's%20second%2Dmost%20senior,demote%20those%20of%20its%20rivals> accessed 25 January 2022.

[25] 'GAFA Tax: A Major Step Towards a Fairer and More Efficient Tax System' (*Gouvernement.fr*, 11 April 2019) <https://www.gouvernement.fr/en/GAFA-tax-a-major-step-towards-a-fairer-and-more-efficient-tax-system> accessed 25 January 2022.

[26] Ryan Browne, 'Social Media Giants Face Big Fines and Blocked Sites Under New UK Rules on Harmful Content' (*CNBC*, 15 December 2020) <https://www.cnbc.com/2020/12/15/uk-online-harms-bill-tech-giants-face-big-fines-and-blocked-sites.html> accessed 25 January 2022.

[27] 'Australia News Code: What's This Row with Facebook and Google All About?' (*BBC News Australia*, 18 February 2021) <https://www.bbc.com/news/world-australia-56107028> accessed 25 January 2022.

[28] Spencer Soper, 'More Than 50% of Shoppers Turn First to Amazon in Product Search', (*Bloomberg*, 27 September 2016) <https://www.bloomberg.com/news/articles/2016-09-27/more-than-50-of-shoppers-turn-first-to-amazon-in-product-search> accessed 25 January 2022.

competition from Snapchat, TikTok, and Twitter.[112] Amazon took up their defense that providing goods and services to many customers ensures that customers are given good choices.[113] Therefore, by providing these irrational arguments, these companies had tried to establish that they used no illegal and unethical means.

V. "BIG TECH" COMPANIES: CONCERN & REGULATION BY INDIA

These big tech giants are now feared as we address the abundance of power they have accumulated from the past. These companies have created a dependence on any other sector, and any innovation coming up in any industry is advancing these companies in one way or another. One of the unknown things about Amazon is that it is highly indulged in AI other than online shopping, which is their cloud storage services which is also used by famous OnTheTop (OTT) platforms like Netflix, which is also its competitor when we talk about Amazon Prime and how they can impact their competitor just by disrupting the services which are provided to their competitors. They have created connections all over the AI world, and anyone entering there cannot resist these tech giants as they will have to avail their services to survive the market. These are threatening the economy with their dominance and cheap market tactics they either acquire their competition or copy what these competitors are providing, just as Facebook did with Snapchat copying its story feature on Instagram and making it more popular, Amazon also faced probe in India for using the seller data processed on its platform and use it to produce its products and sell it on their online shopping site with a higher preference which created a threat for local seller registered with it, it was suppressing and hurting small businesses registered with it by using their data in the Indian market.

In 2019, Google faced multiple probes in India. CCI mentioned how Google was using its dominant position in the Android market and mandating its apps to be pre-installed on the Android device, violating India's competition. In the report, the play store policies of Google were also termed vague, ambiguous, and arbitrary for Indian users and developers as they impose

[29] IANS, 'Facebook Worried as TikTok Set to Eclipse Twitter, Snapchat Ad Share' (*Business Standard*, 10 April 2022) <https://www.business-standard.com/article/technology/facebook-worried-as-tiktok-set-to-eclipse-twitter-snapchat-ad-share-122041000250_1.html> accessed 1 June 2022.

[30] Shirin Ghaffary and Jason Del Rey, 'The Big Tech Antitrust Report Has One Big Conclusion: Amazon, Apple, Facebook, and Google are Anti-Competitive', (*Vox*, 6 October 2020) < https://www.vox.com/recode/2020/10/6/21505027/congress-big-tech-antitrust-report-facebook-google-amazon-apple-mark-zuckerberg-jeff-bezos-tim-cook> accessed 1 June 2022.

unnecessary conditions and commissions on the apps.[114] India needs to have stringent provisions and laws to regulate these internet intermediaries the Government has taken measures to protect the data of users, after various instances of violating public morality on these platforms the Government has also taken up the command to restrict these nuances and breaches. In 2021 the Government has ameliorated the Act and brought up new Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021[115] to enhance the regulation laid previously in the Information Technology (IT) Act, 2000. In new rules, the Government notified the intermediaries platforms of multiple changes which are:

- Due diligence has to be followed by these entities and if not done property the safeguard of harbour provision may be taken back hence the entity will be made liable for the content published on it.
- The grievance redressal mechanism has to be followed and a Chief compliance officer, a nodal contact person, and a resident grievance officer shall be appointed who are residing in India.
- The content originator has to be identified by the entities and shall be surrendered in the offence against the state.
- Intermediaries shall not post any unlawful information and take down any unlawful information ordered by a court or appropriate Government.

These IT rules enforced brought up many controversies as these intermediaries opposed them and alleged that these were against rules and would hurt users' privacy and freedom of speech & expression. These IT rules also notified rules for digital news which were to be followed. The main point of contention was that these rules somehow were restricting fundamental rights of privacy provided under the Article 21- Right to Life[116] and Article 19 - Freedom of Speech and expression[117] as these mandated companies to collect and deliver information about its users secondly it was empowering Government to take down any content which it believes is unlawful however the scope of unlawful was not made clear.

[31] Pankaj Doval, 'Google Abusing Position, Playing Unfair: CCI Probe', (*The Economic Times*, 18 September 2018) <https://economictimes.indiatimes.com/tech/technology/google-abusing-position-playing-unfair-cci-probe/articleshow/86311991.cms> accessed 1 June 2022.
[32] Ministry: Electronics and Information Technology, The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (*PRS India*, 25 February 2021) <https://prsindia.org/billtrack/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021> accessed 1 June 2022.
[33] *Justice K.S. Puttaswamy (Retd.) &Anr. v. Union of India &Ors* [2017] 10 SCC 1, AIR 2017 SC 4161.
[34] The Constitution of India, 1950.

A. Analyzing Data Protection Bill

India presently does not have comprehensive data protection legislation. In 2019 Ministry of Electronics and Information Technology (MeitY) presented a draft of a personal data protection bill. After the world was hard hit by the pandemic, the penetration of the internet has been in a paramount position and people adopted the change and shifted online to surpass the hindrance generated by the pandemic and lockdown. More proliferation of digital platforms, software, gadgets, and the internet was used and with this data revolution, there was also an increase in data breaches, cyber-attacks, hackers, and all kinds of threats to our data which we used online to operate addressing the spike in such threats this bill was introduced to safeguard the interest of every user producing data footprints online and to make these data collectors accountable. This bill provides the framework for the protection of personal data and also classifies a category of sensitive personal data under which financial information, biometric data, etc. were covered. This bill shall apply to the Government of India, any company incorporated under India, and any foreign company that is dealing with personal data in India and also establishes a regulatory body for data protection; it also renders rights to individuals to protect their data and authorizes them to give consent for their data being used by any entity with certain exceptions under which consent will not be required one of which is in case of a medical emergency. The bill also empowers data fiduciary to collect the data without consent when an offence is done by an individual or an entity. Data fiduciaries are given powers that may demolish the bill's purpose, which will eventually lead to infringement of rights. Section 35 of the bill is the most controversial part which empowers the Government or any of its agencies to circumvent the laws and its provision to safeguard public order, sovereignty, friendly relation with foreign states, and the security of the state. The bill is expected to contain 98 clauses and will be introduced at the end of the parliament's winter session, which will be a bodacious event to look into.[118]

B. The Competition Act, 2002

The Competition Commission of India (CCI) is established under this Act to curtail any unfair practice done to cripple the competition in the market. As per section 4(1) of this Act, no enterprise shall abuse its dominant position and impose unfair or discriminatory conditions on

[35] Ministry of Electronics and Information Technology (MeitY), 'Data Protection India' (*State IT Secretaries Conf*, 12,13 February 2018) <https://digitalindia.gov.in/writereaddata/files/6.Data%20Protection%20in%20India.pdf> accessed 1 June 2022

the purchase of service[119]. These tech giants have created a prominent place in the market and they do have a hidden monopoly that is not there on paper but will be apparent with time. They own a dominant share in the market, they control the market and any player entering into it, they are manipulating the market as their wants overall, they own the market which is a threat to healthy competition in the economy. They are violating various rights of people in India as well as around the globe and they are trying to nullify the competition which is atrocious for any country. Provision of the Act shall be exercised with utmost sincerity and rigidness to regulate these companies more efficiently. In India, CCI has imposed penalties upon entities multiple times if they are found to be violating laws. For instance, in a very popular case of future retail and Amazon, after giving a decision in favour of Amazon, CCI withdrew it and imposed a penalty of 2 billion rupees[120] on Amazon to conceal the real fact and to suppress the actual scope due to which deal between future retail and reliance industry was long pending and obstructed.

VI. HOW TO DEAL WITH BIG TECH COMPANIES?

Several cases are going on against these big tech giants and many investigating authorities across the globe like FTC, CCI, Department of Justice (DoJ), etc. are investigating them for alleged anti-competitive practices, privacy data breaches, and other unfair practices. There are many possible outcomes of these investigations but the most realistic one is that these companies will hire an army of lobbyists and lawyers for any resulting cases, and in case any wrong would be found then they will be slapped with penalties and some new regulations will be put in place but all these will be forgotten in a few more years. Nevertheless, something more has to be done to make sure that they don't grow in size in the future and become uncontrollable. Various possible solutions which can be used are as follows –

A. Break-Up Big Tech Giants

In past, the companies used to be relatively simple and they use to operate with much clarity. Therefore, breaking up big companies into smaller and separate segments to operate independently without using any network or connection with the parent company was easier. E.g., Standard Oil, a US-based company, use to produce and sell oil and had a massive share of the

[36] The Competition Act 2002 (Act 12 of 2002).
[37] Reuters, 'CCI Suspends Amazon's 2019 Deal with Future Group Citing Suppression of Information', (*The Times of India*, 17 December 2021) <https://timesofindia.indiatimes.com/business/india-business/cci-suspends-amazons-2019-deal-with-future-retail-citing-suppression-of-information/articleshow/88342430.cms> accessed 1 June 2022

market so when it was broken up in 1911 it was simply divided up into 34 smaller each with their production facilities and networks.[121] But how do you break up a company that doesn't do just one thing, take an example of how you break Google or its parent company Alphabet when they do a search, advertising, consumer electronics, cloud computing, online services, and much more. Well, FTC Chief Joe Simmons has recently said that, if necessary, he is ready to break these big companies. He also said a quote, "It's not ideal because it's very messy, but if you have to, you have to." His agency has started an investigation against Facebook and undoing previous mergers and acquisitions may be a reality which means letting go of WhatsApp and Instagram.[122] Undoing these mergers will be complicated but this might reinvigorate competition allowing consumers to benefit. Messaging domain is today's most prevalent and engaging area, including WhatsApp messaging, Messenger, and Instagram messaging, which are all owned by Facebook. Now, if these all will be separate companies then have to try and compete by spending more money on either innovating their products or decreasing the number of advertisements, they are showing to capture the good market. In a competition between companies, consumers win.

This idea is great but it may result in some disruptions as well. Imagine if YouTube has to be split off from Google which right now isn't much profitable it's just breaking even as it stands, so YouTube as a standalone company might collapse on its own. No current litigation is focusing on a monopoly on video sharing but it's an example of how landscapes can change. So, there are two sides to Breaking up these companies and both are equally important, therefore, while making any decision governments and authorities have to think from both perspectives. It's now has become extremely important to stop these companies from creating a monopoly in the market for reasons already discussed.

B. Building Alternative Platforms

Big tech companies are this huge because they provide not only a single service but several services that have resulted in capturing a massive share in the market. Google is providing so many services, which include maps and payment systems through Google Pay and Google Maps and in case of international disruption or tussle, many sectors of the Indian economy directly or indirectly will get affected. The cab market largely relies on the services of Google Maps.

[38] The Editors of Encyclopedia, 'Standard Oil', Encyclopedia Britannica 24 March 2020 <https://www.britannica.com/topic/Standard-Oil> accessed 25 January 2022.
[39] 'The War on Big Tech - Everything is About to Change' *YTReads* <https://youtuberead.com/the-war-on-big-tech> accessed 1 June 2022.

Similarly, now many businesses are dependent on Google's payment system which will get disarranged causing unemployment of lakhs of people. If the US under their Patriot Act, orders all US companies to stop dealing in the Indian market, then, in that case, the Indian economy will get disrupted economically and impact strategy and defense sector.

All the countries have relied too much on these companies concerning every service. So, one of the solutions can be building alternate platforms that will provide similar services to these big tech giants, which will decrease the dependency on these companies, leading other companies to have a level playing field. For instance, Paytm has launched its mini-app store, and it will choose to use preferred payment options, unlike the Google play store. More than 300 firms, including Ola, Freshmenu, Netmeds, etc., have already joined this initiative.[123] Along with this, the idea of the Indian Government to launch its play store is also a much-appreciated initiative. Likewise, other similar apps should be created as an alternative that will prevent anti-competitive behaviour with which eventually customers will win.

C. Enforcement and Regulation of Competition Act and Other Laws

There is the ongoing discussion of changing antitrust laws in which there may be restrictions on sweeping changes in the US. One of the critical and immediate actions needed in this direction is to change or regulate existing competition laws in India like in other countries to protect local and small businesses from this unjust competition. The legislation will need to harmonize the competing policy objectives, notably privacy and anti-trust laws, encouraging competition while also giving sufficient protection to individuals while interacting with digital markets. More transparency and accountability needed to be ensured at the earliest stage.

According to a paper prepared by the European Commission, possibly anti-competitive behaviour should be forbidden, and corporations should have the responsibility of proving that their actions are pro-competitive.[124] Except for the competition act, many countries suggest making a separate law for regulating these big techs altogether. The draft of the EU digital markets Act chose this path and was described as a fast-acting particular tool of regulatory law rather than competition

[40] Tarush Bhalla and Prasid Banerjee, 'Paytm Launches Its Own Mini App Store', (*Livemint*, 5 October 2020) <https://www.livemint.com/technology/tech-news/paytm-launches-its-own-mini-app-store-11601830976822.html. accessed 1 June 2022.

[41] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era', (European Commission, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 1 June 2022

law, and it includes many unique features. So, there are many ways to make laws more effective, and therefore, we should consider changes to provide our competition watchdog with additional tools and resources.

VII. CONCLUSION

No matter how much power these tech giants have gained in different spheres, the most concerning is the political sphere which gives these giants power to hinder the democracy of a country which is not acceptable. These giants are potentially advanced in every way to hamper the privacy of an individual and whole country by invading taxes imposed on them which belong to the government. After enumerating and analyzing all the facts and materiality of the paper, it can be reasonably concluded that the data revolution has started and tech giants have become gigantic. No doubt, they have made our lives easier, but that also comes at the cost of our data, subconscious mind, and liberty. These companies have only made us dependent and delve into their ecosystem without protecting against the breaches buzzing on their platforms. Competition is anytime good but when it is diverted by some companies it hurts others which ultimately hurt the whole economy which in turn eliminates fairness and justice from it.

It is now a need of time that privacy protection shall now become part of corporate social responsibility and these tech giants shall follow that. Privacy and security in cyberspace shall be declared human rights. Any violation in these shall invite hefty fines and punishments that will ultimately stop these giants from any infringement. Even after having IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 which laid down rules to protect personal data, we have seen various data breaches, and it has its nuances Data protection bill is seen as light in the dark and India is hoping to cater the need of protecting data and privacy with it and hoping to overcome the devastating state it is in. With regular advancements in the laws and their enforcement, anything can be overpowered, as the law is the most powerful tool to serve justice.

UNBLOCKING BLOCKCHAIN FROM ANTITRUST UNCERTAINTY: AN INDIAN PERSPECTIVE

- *MS. AMRUTHA ALAPATI AND MS. AVANI LAAD*[*]

ABSTRACT

Blockchain technology is the new revolution in business systems around the globe and has changed the way information is exchanged. It has the potential for changing the way economic systems function and its use over the next few decades has been predicted to be as universal as that of the internet today.

Blockchain has many characteristics that differentiate it from traditional information-sharing systems including decentralisation, immutability and pseudonymity. Given its commercial importance and unique nature, it is relevant to examine blockchain through the antitrust lens for the possible pro or anti-competitive implications.

There are three prominent issues in the blockchain antitrust crossover from the Indian competition law perspective. The Competition Act, 2002 ["the Act"] may not completely apply to blockchain because of the restricted definitions of 'agreement', 'enterprise' and 'collusive behaviour'. Blockchain also creates opportunities for collusion and abuse of dominance and the traditional solutions to such behaviour are inadequate.

In the course of analysis, the inefficacies of traditional competition law in regulating blockchain technology are highlighted and corresponding methods to resolve them are suggested including the notion of "Law is Code " in combination with targeted advocacy.

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I. INTRODUCTION

The latest buzzwords in technological and legal development are "blockchain" and "cryptocurrency". This is largely due to their impact on existing technologies and the way that information is stored and transmitted. Blockchain technology is poised to take over the future of data-sharing in the form of Web3. This global expansion will be aided by the rise of the Metaverse and the digital economy. Experts say that by the end of 2030, blockchain technology may potentially form the building block for 30% of customer usage worldwide. It may also bring in business worth over $176 billion by the year 2025.[125] These facts are proof of the undiscovered potential of blockchain technology. Therefore, it is of no surprise that the regulation of this technology under existing areas of law is dominating legal discussion and inquiry. One such area is that of competition law.

Blockchain has presented a variety of new and interesting challenges to the existing investigative approach of the Competition Commission of India (CCI) and defies some of the basic definitions of anti-competitive actions such as 'agreement', 'enterprise', and 'collusive behaviour'. Therefore, it is important to take a closer look at the existing legal provisions of the Act and the case laws of the CCI to look at blockchain through this new lens. It is important for all the stakeholders to understand the legal threats of competition to devise solutions and prevent anti-competitive behaviour.

In this article, the authors aim and endeavour to resolve the competition law questions that have been raised over blockchain technology. Primarily, this article involves a basic background to blockchain technology, which uses a chain of blocks to sequentially arrange and store data securely. There are two types of blockchains i.e. public and private. Next, the applicability of competition law to blockchain technology is segmented over a discussion of the definitions and terms such as 'agreement', 'enterprise', and 'collusive behaviour' that are relevant to the CCI's approach to antitrust issues. This is done through an analysis of the possible vertical agreements, horizontal agreements and smart contracts that could possibly be entered into in the domain of blockchain technology. Lastly, the two main competition law issues of 'collusion' and 'abuse of dominance' and their possible occurrence and resolution in the 'relevant market' are analysed.

[125] 'Blockchain Tech Is the Future' *Hindu Business Line* (20 December 2021) <https://www.thehindubusinessline.com/opinion/blockchain-tech-is-the-future/article37999487.ece#:~:text=By%202030%2C%20it%20could%20be,simply%20shows%20the%20unfolding%20potential> accessed 13 March 2022.

Given the growing importance of blockchain technology, there is a need to identify all possible adverse effects on competition in order to realise the objects of competition law and curb anti-competitive behaviour.

II. BACKGROUND TO BLOCKCHAIN

A. What are Blockchains

Blockchain is a technology involving, as the name suggests, a chain of blocks containing information which are arranged sequentially and stored in a decentralized and distributed ledger.[126] Thus, on a blockchain, the transactions are recorded and stored across a number of different nodes (or computers) in the network. Blockchain allows its users to interact with each other by way of peer-to-peer transmission and has a number of relevant basic characteristics.

A blockchain is decentralized, meaning that there is no central power or authority controlling it and every addition of a new block to the chain requires the consensus of all users. ***Decentralization*** prevents the control of a blockchain from being concentrated in any single entity and thus makes it more secure and democratic. Further, every user on the blockchain is identified by way of a unique public address, as opposed to their real identities, and thus, a blockchain is ***pseudonymous***. Transactions carried out on the blockchain are ***immutable***,[127] meaning that they cannot be altered or deleted and shall be stored on the ledger as a permanent record. Therefore, decentralization, pseudonymity and immutability are the three unique and essential characteristics of a blockchain that may affect the way antitrust law is applied to the technology.

B. Types of Blockchains

Blockchains can be broadly classified into two categories: public and private

i. Public Blockchains:

These blockchains have open access and are hence free for all masses to join. They do not require any person to take prior permission to participate in the blockchain.[128] Bitcoin is an example of a

[126] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (White Paper, 31 October 2008).
[127] Toshendra Kumar Sharma, 'How Data Immutability Works in Blockchain?' (Blockchain Council) <https://www.blockchaincouncil.org/blockchain/data-immutability-works-blockchain> accessed 5 January 2022.
[128] Toshendra Kumar Sharma, 'Public vs. Private Blockchain: A Comprehensive Comparison' (Blockchain Council) <https://www.blockchain-council.org/blockchain/public-vs-private-blockchain-a-comprehensive-comparison/> accessed 5 January 2022.

public blockchain network. In such networks, all participants can see and access the ledger, and any change or modification in the blockchain would require consensus from all participants.[129] The consensus mechanism usually followed by public blockchains is proof of work, wherein miners, who are certain participants of the blockchain, compete in order to solve a hashing algorithm, which allows them to verify a transaction.[130] They are further rewarded for contributing their computational power by way of a transaction fee. Thus, the entities or persons associated with a public blockchain can be divided into ***users, miners*** and ***developers***.

ii. Private Blockchain:

A private or permissioned blockchain is not open to all and its access can only be gained by obtaining permission. In such networks, the control of the blockchain lies with one or more trusted entities or intermediaries.[131] Unlike public blockchains, parties to a transaction in a private blockchain would be the only ones having knowledge of and access to it.[132] Consequently, a private blockchain is more centralized in comparison to a public blockchain. Moreover, the consensus mechanisms employed in public blockchains, such as proof of work, are not generally used in private blockchains.[133] Hyperledger Fabric by the Linux Foundation is one example of a private blockchain.[134]

III. APPLICABILITY OF INDIAN COMPETITION LAW TO BLOCKCHAIN

A. Agreement under Blockchain – Whether Mere Participation is Agreement?

In cases of anti-competitive agreements, one of the first tests by the CCI is to evaluate the existence of an agreement – whether horizontal, vertical or conglomerate. The Act defines

[129] A.R Sai et al., 'Taxonomy of Centralization in Public Blockchain Systems: A Systematic Literature Review', (2021) 58(4) Inf. Process. Manage. 102584, 2.
[130] Laura Gargolinski Jaeger, 'Public versus private: What to know before getting started with blockchain' (IBM) https://www.ibm.com/blogs/blockchain/2018/10/public-versus-private-what-to-know-before-getting-started-with-blockchain/https://www.ibm.com/blogs/blockchain/2018/10/public-versus-private-what-to-know-before-getting-started-with-blockchain/ accessed 30 May 2022.
[131] Private Blockchains (Bird & Bird X) <https://www.twobirds.com/~/media/pdfs/in-focus/blockchain/private-blockchain-briefing-note.pdf> accessed 5 January 2022.
[132] Toshendra Kumar Sharma, 'Public vs. Private Blockchain: A Comprehensive Comparison' (Blockchain Council) <https://www.blockchain-council.org/blockchain/public-vs-private-blockchain-a-comprehensive-comparison/> accessed 5 January 2022.
[133] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 281, 293.
[134] What is Hyperledger Fabric (IBM) <https://www.ibm.com/topics/hyperledger> accessed 5 January 2022.

"agreement" as "any arrangement or understanding or action in concert".[135] Thus, it does not matter whether the said agreement is written or legally enforceable.[136] Merely entering into an agreement is actionable. So, the question with blockchain that arises is whether mere participation can be deemed as agreement as there may not be any other method to determine, for instance, collusion in the sharing of sensitive information, etc. An interpretation of the definition certainly suggests that an agreement to participate according to the rules of a blockchain or mere participation in the blockchain would amount to an agreement.

The question of "mere participation" as liability for anti-competitive conduct was decided in the case of a trade union by the CCI in the affirmative.[137] However, this position has not been tested against the existence of an agreement.

Other jurisdictions, such as Singapore, have explored the connotations of "mere participation" in anti-competitive agreements and come down heavily on such conduct. The Competition Commission of Singapore (CCS) in ***Pest Control Services***[138] held that merely entering into an anti-competitive agreement regardless of intent to execute is a violation of competition law. In ***Employment Agencies***,[139] the CCS stated that without an express declaration of non-participation, there is tacit approval which is tantamount to a violation. In the ***Electrical Works***[140] case, the CCS for the first time allowed a member of the cartel, which was the whistle-blower, to avail full immunity provided that it was not the mastermind or did not pressurise the other members to join.[141]

B. Blockchain as an Enterprise

The next hurdle in evaluating blockchain technology under competition law is to assess whether it can be classified as a "dominant enterprise". The difficulty lies in the fact that there is no single entity. Rather, multiple entities participate at different points and are involved in the decision-making. It is a decentralised mechanism. One answer to this is to evaluate their actions under the

[135] Competition Act 2002, s 2(b).
[136] *CCI v Coordination Committee of Artistes & Technicians of W.B. Film & Television*, (2017) 5 SCC 17; *Rajasthan Cylinders & Containers Ltd. v Union of India*, (2020) 16 SCC 615.
[137] *T.G. Vinayakumar v Association of Malayalam Movie Artists and Ors*, 2017 CompLR 303 (CCI).
[138] *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore*, CCS 600/008/06 (9 January 2008).
[139] *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers in Singapore*, CCS 500/001/11 (30 September 2011) ("Employment Agencies").
[140] *Collusive Tendering (Bid-rigging) in Electrical and Building Works*, CCS 500/001/09 (4 June 2010).
[141] *Competition Law* (2012) 13 SAL AnnRev 153, 159.

concept of "collective dominance", recognised in the jurisdictions of the UK, the European Union and Singapore. Section 47 of the Singapore Competition Act, 2004, states that 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited'. Similarly, Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and Section 18 of the Competition Act, 1998, recognise the abuse of dominant position by 'one or more undertakings'. However, this concept is not yet recognised in India and thus does not add much to the discussion.[142] The definition of 'enterprise' under the Act, however, sheds some light.

The Act defines an enterprise as "a person or a department of the Government…"[143] and a "person" to include, among others, "an association of persons or a body of individuals, whether incorporated or not, in India or outside India".[144] Thus, a blockchain application may be taken as an enterprise involved in the provision of the service of distributed ledger technology (DLT) under the scheme of the Act.

IV. ANTI-COMPETITIVE AGREEMENTS VIS-À-VIS BLOCKCHAIN

A. Opportunities for Collusion

The first anti-trust blockchain case was over collusion. The US District Court in ***United American Corp v. Bitmain Inc***., is currently hearing claims of collusion among the miners and investors of two rival Bitcoin forks that had an adverse effect on competition in the crypto market and led to mining wars. It is all set to become a landmark judgment that agencies will look to in future.[145]

i. Horizontal Agreements

One form of collusion is horizontal agreements wherein parties engaged in the same industry or business are involved in cartelisation or bid-rigging. Competitors may be a part of the same blockchain application for the sake of efficiency, for the creation of a new market or for

[142] *Fast Track Call Cab (P) Ltd. v ANI Technologies (P) Ltd*, 2017 SCC OnLine CCI 36; *Meru Travel Solutions (P) Ltd. v ANI Technologies (P) Ltd*, 2018 SCC OnLine CCI 46; *Samir Agarwal v CCI* (Cab Aggregators Case), (2021) 3 SCC 136.
[143] Competition Act 2002, s 2(h).
[144] Competition Act 2002, s 2(l).
[145] Konstantinos Stylianou, 'What can the first blockchain antitrust case teach us about the crypto-economy?' (2019) Jolt Digest Harv. J.L. Tech. < http://jolt.law.harvard.edu/digest/what-can-the-first-blockchain-antitrust-case-teach-us-about-the-crypto-economy> accessed 28 January 2022.

improving current processes. However, in certain cases, blockchain applications can also alter the gains and challenges associated with maintaining a collusive agreement. The essential for determining the existence of a collusive agreement is to check if the parties to it have the capacity to do any of the following:

(i) Interact with each other and arrive at a mutually agreeable coordination strategy;

(ii) Monitor each other's conduct to ensure adherence to the agreement;

(iii) Penalise a party in case of non-adherence to the agreement such that the penalty exceeds any possible benefits from the non-adherence.

ii. Exchange of Sensitive Information – An Enabler of Collusion?

One of the main reasons for the growing popularity of blockchain is its immutability and transparency. It engenders trust and facilitates the transfer and storage of large amounts of data. The common assumption is that transparency of data would intensify competition. However, this may not be true in all cases. There is a possibility that information belonging to competitors may be visible on a shared blockchain. Unless sufficient safety measures are included, the information in the ledger can be easily viewed by the blockchain participants, which is termed as the "***visibility effect***". However, the same information may not be accessible to entities outside the blockchain, termed as the "***opacity effect***", due to restricted access in case of a permissioned consortium blockchain or encrypted data with pseudonyms in case of a permissionless public blockchain.[146] Adequate safeguards should be put in place to ensure that this feature does not enable competitors to arrive at an agreement and monitor each other's conduct. However, it is important to consider whether there is any difference that blockchain applications create for information exchange vis-à-vis other existing systems in cases of physical or digital exchange of information.

One difference may be that through a blockchain, information can be exchanged on a near real-time basis. Additionally, there may be greater trust in the authenticity of the data stored in a blockchain than in other systems, due to the secure and immutable nature of blockchains.

iii. Vertical agreements

[146] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 43 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.

Agreements for anti-competitive objects entered into between businesses operating at different stages of the supply chain are known as vertical agreements. They may be in the form of tying-in, for exclusive supply or distribution of goods, services or raw materials, refusal to deal, and for resale price maintenance as per Section 3(4) of the Act.[147] Using blockchain technology, vertical agreements could be entered into by a blockchain for the following objects:

(i) Barring access to any entity using a competing blockchain or payment wallet;
(ii) Restricting developers from dealing with any competing platform;
(iii) Tying the sale of a mining hardware provider's product to a miner through an agreed wallet;
(iv) Barring a blockchain's wallet, nodes or exchange from partnering with competing blockchain applications;
(v) Smart contracts that self-enforce tie-in, exclusive supply/distribution, refusal to deal, or minimum resale price maintenance between entities at different levels of the supply chain.

Thus, the above vertical agreements have the potential to create an adverse effect on competition. Assessing the anti-competitiveness of such agreements would have to be made on a case-to-case basis. The anti-competitive effect of such agreements would have to be set off against the justifications supplied for entering into them.

There is a higher probability of vertical anti-competitive agreements occurring in permissioned consortium blockchains than in permission-less public blockchains. If a public blockchain enters into a refusal-to-deal agreement, its rules would have to be modified, which would require the nodes to be in agreement.[148] Further, any such change in a public permissionless blockchain protocol would imply that it is no longer "permission-less" and "public". Whereas, in a permissioned consortium blockchain, nodes can change their governance rules to engage in such conduct by not permitting an entity from reading the information on the blockchain or/and restricting them from proposing new transactions or/and forbidding them from verifying transactions.[149]

[147] Competition Act 2002, s 3(4).
[148] I. Lianos, 'Blockchain Competition - Gaining Competitive Advantage in the Digital Economy: Competition Law Implications' (2018) Centre for Law Economics and Society UCL vol. 8.
[149] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 289.

Similarly, in a public blockchain, since the data is public, there is no incentive for the blockchain application to impose an exclusive dealing condition for the publishing of blocks. Further, once the block is published in a public blockchain, the node also has no incentive to publish it in another public blockchain given the costs involved. However, in a permissioned blockchain, dealing exclusively may be appealing to a blockchain application if it wishes to be the only source for data on a transaction i.e., being the sole source of data may increase the attractiveness of the blockchain.[150]

B. Smart contracts

Smart contracts are agreements that are executed by automation i.e., code is written onto a blockchain so that when specific conditions are met, certain actions are automatically performed. For example, making a payment, sending notifications to parties, or issuing tickets. Parties must first agree on "if/when/then" conditions to determine when a certain action must occur during the transaction and possible exceptions if any. A developer can then write the code. A network of computers executes the transaction, which cannot be altered, and the results can only be viewed by parties with access. Therefore, smart contracts can reduce paperwork, increase the speed and efficiency of transactions, and result in greater transparency and trust between parties.[151]

With the advent of 5G, the Internet of Things and AI, smart contracts would play an important role in the world of technology and commerce by creating new products and services. However, smart contracts in a few cases could be used to enforce and maintain collusive agreements without the need for extensive information exchange. One way to do this would be for competitors to use smart contracts to self-enforce collusion using code and pricing algorithms in line with the collusive agreement.[152] Further, smart contracts could be misused to self-execute punishment on a co-conspirator who deviates from the terms of the collusive agreement.

For instance, a smart contract may be used to create a fund with contributions from each firm. When one of the firms deviates from the agreed price or output levels by lowering their price or increasing their output, a smart contract may result in automatic forfeiture of the amount and its distribution among the other firms. If the punishment is to carry a deterrent weight, the loss that

[150] ibid.
[151] What are smart contracts on blockchain? (IBM) < https://www.ibm.com/topics/smart-contracts > accessed 1 June 2022.
[152] I. Lianos, 'Blockchain Competition - Gaining Competitive Advantage in the Digital Economy: Competition Law Implications' (2018) Centre for Law Economics and Society UCL vol. 8.

would occur from this punishment must be greater than the profit made from violating the collusive agreement. If the loss to the deviator from the forfeiture of funds exceeds the benefit from deviation, the smart contract could act as deterrence to deviation and thereby facilitate collusion. If firms use smart contracts to engage in collusive conduct, then they would be acting in contravention of the Act.[153]

V. ABUSE OF DOMINANCE VIS-À-VIS BLOCKCHAIN

As blockchain gains prominence, it is inevitable that concerns pertaining to abuse of dominance over and by blockchains would also emerge. However, these considerations are premised on the overarching question of whether dominance can be established on blockchains at all, and the persons on whom the liability, if any, would fall, in light of the decentralized and pseudonymous nature of blockchains. The relevant provision regulating abuse of dominance under the Act is Section 4, where an enterprise is prohibited from abusing its dominant position,[154] with a "dominant position" being defined as a position of strength in the relevant market.[155] Thus, the first challenge in ascertaining liability in such cases is the delineation of the "relevant market". The second challenge is the characterization of "*dominance* itself, and its determinative factors given the unique technicalities of blockchain. This is similar to the challenges posed in ascertaining dominance in digital markets, as blockchain too, is digital innovation. The third challenge emerges in analysing the effects of dominance, and whether a firm is engaging in unilateral anti-competitive practices through its dominant standing. Here, the different anti-competitive practices that can be carried out on and through blockchains are pertinent.

A. Delineation of Relevant Market

To ascertain if an entity has dominance, it is imperative to first determine the boundaries under which such alleged dominance might be present, constituted as the "relevant market". Under the Act, the relevant market is determined in terms of the relevant product and geographic market.[156] A relevant product market consists of products or services regarded as interchangeable or substitutable by consumers[157] while a relevant geographic market comprises an area where there

[153] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 36-46 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.
[154] Competition Act 2002, s 4(1).
[155] Competition Act 2002, s 4.
[156] Competition Act 2002, s 2(r).
[157] Competition Act 2002, s 2(t).

is distinct homogeneity of competitive conditions as regards a product or service, as compared to neighbouring areas.[158]

The traditional methods and rules of determining relevant markets may correspondingly also be applied to blockchain applications, by assessing the substitutability of the application with other blockchain or non-blockchain applications. Thus, as enumerated by the CCI in its discussion paper, the relevant market can be defined in three ways.[159] *Firstly,* where the blockchain application does not have any close substitutes, in the form of other similar blockchain or non-blockchain applications, then the application itself would constitute a single relevant market. *Secondly,* the relevant market may consist of a number of blockchain applications providing substitutable services or products, but without any non-blockchain applications. *Thirdly,* the relevant market may consist of a number of substitutable blockchain as well as non-blockchain applications, being either digital or non-digital. This approach is similar to the one utilized when regarding online and offline sales as part of the same relevant market.[160]

It is important to note that a relevant market in the case of blockchain can be determined on the basis of the type of applications running on it, but not the blockchain as a whole. This is because a single blockchain may host a plethora of different applications, and thus, have different products or services hosted on it. Since a relevant market has to be determined on the basis of substitutability or interchangeability of such products or services, the blockchain platform and the applications thereon might fall under distinct relevant markets.

The pseudonymous nature of blockchains poses a difficulty when it comes to ascertaining the relevant geographical market, as the identity or location of the participants of the blockchain would not be accessible.[161] Moreover, a blockchain might itself also be transnational, which further adds to the difficulty. It is especially complex, hence, to evaluate the relevant geographical market in the case of blockchains, so long as the problem posed by pseudonymity of users on a blockchain persists. Without clarifying the geographic dimension of a relevant market, it would not be possible to carry out an accurate dominance analysis as it could be that some blockchain

[158] Competition Act 2002, s 2(s).
[159] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 41 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.
[160] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 304.
[161] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 41 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.

applications might only be concerned with particular geography and do not compete with the application in assessment. Thus, the inability to determine the relevant geographic market is a huge challenge for competition law agencies that directly relates to a specific and essential feature of blockchain technology.

B. Determining Dominant Position – The Relevant Elements

Assuming the relevant market has been delineated, the next step would involve evaluating the strength of a particular entity in that market in order to ascertain its dominance. In this regard, Section 19(4) of the Act lays down a number of factors for inquiring into the dominant position of an enterprise, including its market share, size and resources, economic power, the dependence of consumers, etc.[162] The CCI's decisional practice has shown that market share has invariably been one of the first factors relied on by it for ascertaining dominance.[163]

However, when it comes to blockchain, it is difficult to identify the factors that may be used in assessing market power, especially between blockchain applications that compete with each other.[164] This means that the relevant elements for determining market share in the case of blockchain applications might differ from that of brick and mortar. Some factors that may be relied on include the number of users, the number of transactions taking place on the blockchain applications, the revenues generated, etc. However, the value of revenue may itself pose its own difficulties, as, on the blockchain, revenue is generated through tokens, whose value itself may be volatile and fluctuating.[165] Other factors include *inter alia*, the respective market powers of the underlying participants and the data held by the blockchain application. Data has also recently been recognized as a form of non-price competition by the CCI,[166] and in the recent *suo-moto* investigation against WhatsApp, the CCI observed that data can be a factor influencing the market power of an enterprise.[167]

Thus, depending upon the facts of a particular case, different factors or combinations thereof might be relied upon to assess market power. Like digital markets, network effects may also be

[162] Competition Act 2002, s 19(4).
[163] Abir Roy, 'Competition Law in India: A Practical Guide' (Kluwer Law International 2016) 168.
[164] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 305.
[165] ibid.
[166] Competition Commission of India, 'Market Study on the Telecom Sector in India' (2021) 29.
[167] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Moto Case No. 01 of 2021.

taken into consideration when determining dominance. Further, on similar lines, specific to blockchains is also the "***token effect***" wherein blockchain, by use of tokens, incentivizes masses to join it quickly, before the token value increases further.[168]

C. Abusive Practices Through Blockchain

Dominance by itself is not contrary to the Act; only its abuse is.[169] Therefore, once the dominant strength of an enterprise has been established, it becomes imperative to see whether any abusive conduct has been affected by the dominant entity. It is not necessary that the abusive conduct have any link with the market power of the entity; so long as the conduct is by an enterprise in dominance, it would violate the Act.

i. Exclusionary, Discriminatory and Exploitative Practices

The biggest exclusionary conduct that is likely to be performed through private permissioned blockchains is the refusal of access of the blockchain to others. This conduct cannot be carried out on a public blockchain as the access therein is free to all. However, the high likelihood of such conduct in a private blockchain makes this a relevant consideration, especially with the advent of blockchain consortia, wherein the members of the consortia may refuse access to new entrants.[170] Refusal of access becomes an exclusionary practice in the circumstance where the usage of the blockchain becomes an "*essential facility*" for competing in the market.[171] For example, it could be that the usage of blockchain technology has allowed the members of the consortium to gain access to certain data which gives them a competitive edge and has significantly reduced their costs, thereby allowing them to provide services at a lower cost. In such a situation, access to the blockchain becomes essential for a new entrant to compete in the market, and refusal of access would amount to imposing barriers to entry for such prospective entrants.

[168] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 296.
[169] Competition Commission of India, 'Provisions Relating to Abuse of Dominance', (Advocacy Series 4) 7.
[170] Primavera De Filippi & Aaron Wright, 'Blockchain And The Law: The Rule Of Code' (Harvard University Press 2018) 31.
[171] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 43 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.

Apart from the actual refusal of access, constructive refusal occurs wherein access to the blockchain may be allowed to a competitor but the requisite information or data has not been made accessible to it, or where the cost of access to the blockchain is very high for the new entrant to be able to afford.[172] The CCI discussed the essential facility doctrine in the case of ***Arshiya Infrastructure v. Ministry of Railway***, wherein it held that the doctrine can only be invoked in situations where there is technical feasibility for providing access, where lack of access would lead to a distinct possibility of lack of effective competition, and where it is possible to provide access on reasonable terms.[173] Hence, refusal of access to a permissioned blockchain is in contravention of competition law in the situation where it constitutes an essential facility for competition, and where the refusal is unjustified. In such situations, the dominant enterprise or consortia may be asked to provide access to the blockchain on fair, reasonable and non-discriminatory (FRAND) terms, as is also the practice in cases of refusal of licensing of standard essential patents.[174]

Apart from the refusal of access, another exclusionary practice possible through blockchains is tying, wherein the sale of a product or service is made subject to the purchase of other products or services or other obligations. These practices once again are unlikely to be carried out on a public blockchain, as access to such blockchains is free. However, private blockchains may greatly make use of tying as a way to gain more profits by tying access to the blockchain with other obligations.[175]

Exclusionary abuse of dominance may also be carried out through predation, including predatory innovation. Predatory innovation can be defined as a practice, wherein innovation is implemented solely for achieving anti-competitive purposes, and which does not benefit the consumer in any way.[176] For instance, a new version or up-gradation to technology might be carried out under the guise of 'innovation' while the true purpose behind such up-gradation was actually to eliminate competition. As opposed to public blockchains, where every change requires the approval of all the users and any modifications so made are traceable, predatory innovation is highly likely in private blockchains. In private blockchains, it is relatively easier to adopt modifications and changes, without requiring the prior approval of users. Further, it is much faster to make changes

[172] ibid.
[173] *Arshiya Infrastructure v. Ministry of Railway*, Case No. 64 of 2010.
[174] Dr. Thibault Schrepel, 'Blockchain + Antitrust' (Elgar Online 2021) 196.
[175] ibid 197.
[176] Dr. Thibault Schrepel, 'Predatory Innovation: The Definite Need for Legal Recognition' (2018) 21 Smu Sci. & Tech. L. Rev. 19, 22.

to the code of a blockchain, without raising any additional costs. Moreover, in private blockchains, such modifications may even be invisible to the other users. Thus, there is a dire need for legal measures to be implemented in order to tackle the practice of predatory innovation. Other abusive or exclusionary conduct that can be facilitated through blockchains is *inter alia,* predatory pricing and margin squeeze.[177] Private blockchains may also facilitate discriminatory abuses. Such practices involve imposing different conditions when trading with different parties.[178] For instance, under price discrimination, different prices might be charged for the same product from different parties, or a particular party may be charged the same price for different products. Similarly, in blockchain, different transaction fees might be charged to different users. The visibility effect prevents price discrimination from being carried out in a public blockchain; however, users of a private blockchain might be prone to the imposition of discriminatory terms.

ii. Abusive Conduct and the Visibility Effect

From the foregoing analysis, it has been evident that the likelihood of anti-competitive practices is quite less when the blockchain in question is a public blockchain. This is attributed to what has been coined as the "***visibility effect***".[179] The visibility effect implies that all transactions and actions of the users of a public blockchain are open and visible to all. The consequent transparency is said to create a check on users of public blockchains so that they do not engage in anti-competitive practices. In contrast, private blockchains lack this transparency, as their access is not open to all, the governance does not require approval of all users, and it is much easier to control as regards the information visible to each user. Thus, private blockchains may be misused and exhibit greater anti-competitive conduct. Consequently, there is a need for keeping a check on the activities of a private blockchain, in order to prevent them from engaging in such practices.

VI. WHOSE POWER AND WHOSE LIABILITY?

A pertinent issue in an inquiry of antitrust vis-à-vis blockchain is the decentralized nature of blockchain and its legal nature. Competition law applies to distinct enterprises; however, since a blockchain is decentralized among its users, it is difficult to understand who the dominant entity

[177] Pike, C, and A. Capobianco, 'Antitrust and the trust machine' (OECD, 2020) 10 <https://www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf> accessed 12 January 2022.
[178] Competition Act 2002, s 4(2)(a).
[179] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 308.

in question would even be in the first place. It becomes even more difficult in light of the fact that collective dominance as a legal concept is not yet recognized by Indian competition law. Moreover, it can be argued that the very notion of market power under competition law is premised on there being a 'central' power, which is not the case under blockchain, being free of central power and founded upon decentralized decision-making. Closely connected to this issue is also the issue of liability, when dominance is presumed to have been found. Whether any unilateral anti-competitive practice on a blockchain would lead to the liability of all its users or only the creators of the blockchain? This directly relates to the problem of the legal characterization of a blockchain. Even if the blockchain is treated as an association of persons for the purpose of the Act, it would mean an unlimited liability of all the participants of the blockchain, despite the unfair practice only being attributed to a fraction of users unknown and unrelated to them. This further disincentivises them from participating in a blockchain. Hence, decentralization makes it difficult to determine and trace the legal nature of blockchains and thereby the liability of the responsible entities.

Another concern is the lack of a human element in blockchain technology, which seems to be a prerequisite for liability under the Act, pursuant to the case of ***Samir Agarwal v. ANI Technologies***.[180] In this case, the CCI held that when prices are being determined algorithmically, it would not amount to collusion or cartelization. Accordingly, where the abuse of dominance is also being exercised by virtue of blockchain algorithms, the question of liability becomes more complex.

VII. IMPLICATIONS ON CRYPTOCURRENCY

Cryptocurrency is one of the most prevalent applications of blockchain technology today. The first anti-trust blockchain case in the US[181] is a testament to the anti-competitive issues that can arise in a blockchain technology resulting in its misuse. Given the existing concerns of cryptocurrency being used for fraud, money laundering,[182] terror financing,[183] causing monetary

[180] *Samir Agarwal v. ANI Technologies*, Case No. 37 of 2018.
[181] 'United American Corporation v. Bitmain Inc.', (2018) Case No. 1-18-cv-25106 (S.D. Fla.).
[182] 'Government concerned over crypto use for laundering, terror' Times of India (New Delhi, 14 Nov 2021) <https://timesofindia.indiatimes.com/india/government-concerned-over-crypto-use-for-laundering-terror/articleshow/87691627.cms>.
[183] 'Cryptocurrencies could be misused for terror funding, says Nirmala Sitharaman at IMF meeting' Scroll.in (New Delhi, 19 April 2022) <https://scroll.in/latest/1022156/cryptocurrencies-can-be-misused-for-terror-funding-says-nirmala-sitharaman-at-imf-meeting>.

instability, etc. in India, any possible indication of collusion through blockchain could influence Indian drafters.

The Indian legislature has been mulling a complete ban on cryptocurrency in India since 2018 and more recently with the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021.[184] However, under the Finance Act, 2022, a new tax levy has been introduced against cryptocurrency[185] which may showcase an intention to regulate cryptocurrency instead of imposing a complete ban. Currently, India is finalising its consultation paper on cryptocurrencies with inputs from the World Bank, International Monetary Fund (IMF) and other stakeholders.[186] The competition advocacy initiatives suggested by CCI in relation to the blockchain[187] is another instance of efforts taken to regulate crypto by overcoming the anti-competitive effects of blockchain.

VIII. SUGGESTIONS AND CONCLUSION

Blockchain technology and Indian competition law, both being in their nascent stages, pose difficulties when it comes to their interplay. Nonetheless, it is inevitable that these two domains do and would continue to intersect, as anti-competitive concerns are likely to be raised even through the use of blockchain. Moreover, being a breakthrough technology, blockchain has the potential to significantly impact the way transactions would occur in the future and it is important that regulatory oversight is maintained over the use of this technology that is becoming more and more widespread with every passing day. The recent blockchain antitrust case filed in the USA showcases the need for there to be clarity on how these two domains interact.[188]

It has been found that blockchain technology is capable of being used to serve anti-competitive ends – by way of collusion and abuse of dominance. However, many challenges are faced even at the point of applicability of competition law to the blockchain, given its unique nature. The first concern pertains to the legal nature of blockchain and whether it satisfies the definition of

[184] Cryptocurrency and Regulation of Official Digital Currency Bill, 2021.
[185] Finance Act 2022, s 28; Income Tax Act 1961, s 115BBH.
[186] 'India finalising consultation paper on crypto currencies: DEA secretary' Times of India (New Delhi, 30 May 2022) < https://timesofindia.indiatimes.com/business/india-business/india-finalising-consultation-paper-on-crypto-currencies-dea-secretary/articleshow/91899135.cms>.
[187] Competition Commission of India, 'Discussion Paper on Blockchain Technology and Competition' (2021) 43 <https://www.cci.gov.in/sites/default/files/whats_newdocument/Blockchain.pdf.> accessed 6 January 2022.
[188] *United American Corporation v. Bitmain Inc.*, (2018) Case No. 1-18-cv-25106 (S.D. Fla.).

"enterprise" as required under the Act.[189] The essential characteristics of blockchain, namely, decentralization, pseudonymity and immutability also pose their respective problems. Decentralization poses an issue when it comes to determining the actual subject of liability in a blockchain, as to whether liability would be on the blockchain developers, users or miners, or all of them collectively, and the methodologies to determine this liability. Moreover, private blockchains cause challenges in even detecting anti-competitive conducts over a blockchain and extracting the requisite information, thereby reducing the likelihood of *suo-moto* actions. Pseudonymity makes it difficult for authorities to ascertain the true identity of the users behind any anti-competitive conduct, and immutability makes it difficult to remedy any anti-competitive actions once detected, as the algorithm or code would continue to self-enforce.

Nonetheless, these characteristics are the definitive features of a blockchain and thus cannot and should not be eliminated from the technology. Thus, competition law must find a way to apply to the blockchain without compromising its essential qualities, whilst also ensuring that the blockchain does not become a playground for players to indulge in anti-competitive practices. As proposed by Dr. Schrepel, this can be ensured by adopting what is called the "***law is code***" approach, which involves close coordination between legal as well as technical authorities to ensure that the very code giving rise to a blockchain has some default measures in place against future misconduct.[190] Smart contracts can be embedded into the code that allows competition authorities to infiltrate into the technology and gain access to information when required. There can also be smart contracts authorizing competition authorities to take particular actions upon the happening of particular events.

Moreover, blockchains can be mandated to set up grievance systems in place to ensure that any user is able to report any dubious or anti-competitive conduct that it suspects. Whistle-blower mechanisms may also be implemented for private blockchains. In the case of private blockchains, mandatory notification requirements to the CCI may also be imposed which would allow it to detect and track the existence of any blockchain consortium existing in the market. To resolve the issue of cross-border jurisdiction and enforcement, close cooperation is needed between competition agencies across the world.

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[189] Vishal Rajvansh & Saumya Sinha, 'The Interaction Between Blockchain and Competition Law in the Indian Competition Regime' (Kluwer Competition Law Blog) <http://competitionlawblog.kluwercompetitionlaw.com/2021/05/05/the-interaction-between-blockchain-and-competition-law-in-the-indian-competition-regime/> accessed 15 January 2022.

[190] Dr. Thibault Schrepel, 'Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox', (2019) 3 Geo. L. Tech. Rev. 326.

Section 49 of the Act[191] places a responsibility on the CCI to undertake competition advocacy activities which include spreading awareness and promoting competition in India. These efforts can be extended to include blockchain users, developers and business owners. Competition policy can be coded into the technology to prevent sharing and storing of sensitive information so that the technology is compliant with competition law. Therefore, steady implementation of the "***law is code***" approach would greatly ensure that regulatory oversight by competition agencies is maintained over the use of blockchain technology, without compromising its basic features. Technology and law cannot exist in isolation. They must complement each other and operate in consonance.

[191] Competition Act 2002, s 49.

INTRODUCTION OF COMMITMENTS IN INDIAN COMPETITION LAW ENFORCEMENT: IS IT TOO EARLY TO COMMIT?

- *MR. APOORVA UPADHYAY*[*]

ABSTRACT

The Indian Parliament, pursuant to the changes recommended by the Competition Law Review Committee Report is considering an amendment to the Competition Act, 2002 vide the Competition (Amendment) Bill 2020. One of the proposed changes seeks to introduce a framework for resolving cases with a package of remedial obligations in response to Commission concerns. The use of commitments and settlements for context-specific resolution of cases provides an undeniable appeal however such a form of staccato decision making does not come without its costs. To that end, the article examines the leading cases from foreign jurisdictions and the errors they committed in the implementation of such a mechanism. Additionally, the central argument this article makes is that placing reliance on such a form of decision making represents a significant divergence from realizing the ideal of the formal rule of law. While these decisions might offer legal comfort through a quicker resolution of cases on the one hand they can also compound over time and lead to a situation of shadow jurisprudence where eventually market participants would find it difficult to comprehend the law and how it is being implemented by quasi-judicial authorities such as the Competition Commission of India. The article concludes by providing suggestions on how such a mechanism (if it must) can be introduced by recalibrating the best features of the foreign legislations which would also be in alignment with the Constitution's basic structure and not be in divergence with the formal rule of law ideal.

Keywords: Antitrust, Amendment, Commitments, Settlements, Competition.

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I. INTRODUCTION

The Competition Act 2002 ('the Act' *or* 'the Competition Act') came into force on 20th May 2009 and the Competition Commission of India ('CCI' *or* 'the Commission') has since actively worked towards its statutory objectives of preventing practices which have an adverse effect on competition, encourage competition in the market, protect consumer interest as well as ensure freedom of trade carried on by other participants in markets in India.[192] To address practices that have an adverse effect on competition in India, the CCI has the power to pass orders through Section 27[193] and Section 28[194] *after* an enquiry has been conducted by the Commission. Therefore, the CCI presently is not equipped with powers to preliminarily address instances where a business wishes to voluntarily come forward and offer commitments in the form of behavioural changes and avoid a full-fledged enquiry and the negative press that comes with it. To address this lacuna, the Indian Parliament is considering the introduction of commitments in the Act[195] to optimally utilize its resources and reduce pendency of cases by securing remedial commitments from businesses instead of proceeding with a full decision to address the antitrust concerns.[196]

At first blush, this move of modernizing the procedural framework to more efficient mechanisms is praiseworthy, but a deeper investigation would highlight that introducing such a potent tool prematurely would end up doing more harm than good in the long run. With the object of comprehending the stance of established jurisdictions on commitment decisions, this article will first analyze the position in mature jurisdictions such as the European Union ('EU') and the United States ('US'). Subsequently, this article will highlight the administrative appeal that commitment decisions have which makes them attractive for competition regulators. Nevertheless, the article argues that such a form of decision making makes a sharp divergence from achieving the formal rule of law ideal and how such decisions can compound over a period of time and cause systemic degradation and give rise to a shadow jurisprudence that would lead to ambiguity and uncertainty. Lastly, the article would discuss the developments in India

[192] Arjun Nihal Singh, 'The Need For Settlements And Commitments Under The Competition Act, 2002' (Mondaq,16 January, 2020) <https://www.mondaq.com/india/cartels-monopolies/883880/the-need-for-settlements-and-commitments-under-the-competition-act-2002.> accessed 18 November 2021.
[193] Competition Act 2002, s 27.
[194] Competition Act 2002, s 28.
[195] Competition (Amendment) Bill, 2020, s 48B.
[196] Vartika Rawat, 'Competition Act Amendment: Commitments and Settlements to ensure defaulters name is not publicly sullied' (Economic Times, 30th October, 2019) <https://cfo.economictimes.indiatimes.com/news/competition-act-amendment-commitments-and-settlements-to-ensure-defaulters-name-is-not-publicly-sullied/71814532> accessed 18 November 2021.

concerning ad hoc decision making and consider whether commitment decision making is the right move going forward for competition law enforcement in India.

II. COMMITMENT DECISIONS IN THE EUROPEAN UNION

The Rome Treaty of 1957 established what is today known as the European Union.[197] The Rome Treaty was renamed the Treaty on the Functioning the European Union ('*TFEU*') by the Lisbon Treaty[198] with effect from 1 December 2009.[199] The TFEU in addition to being the constitutional basis of the Union also regulates competition law within the Union. Article 101 of the TFEU prohibits anti-competitive agreements and concerted practices,[200] whereas Article 102 of the TFEU prohibits abuse of dominant market position.[201] The TFEU empowers the competition regulator to enforce these articles through two types of decisions i.e. "*prohibition*" decisions, which are taken pursuant to Article 7 of the European Union Antitrust Regulation ('*Regulation 1/2003*') where the Commission has the option to settle cases and bring an infringement to an end and "*commitment*" decisions which are taken pursuant to Article 9 of the same regulation wherein parties under investigation themselves offer voluntary commitments in the form of behavioural remedies or in some cases structural changes such as divestment of shares to address the antitrust concerns.[202]

Prior to the introduction of Regulation 1/2003, the Commission worked with an informal structure for addressing competition concerns.[203] Regulation 1/2003 introduced a formal procedure through which a company accused of violating EU competition law may offer commitments in the form of behavioural or structural changes to meet antitrust concerns. Upon satisfaction, the Commission can make those commitments binding on the company.[204]

Since its introduction, commitment decisions have become the Commission's mechanism of choice for addressing non-cartel investigations pursuant to Article 101 and Article 102[205] with

[197] Treaty of Rome, 1957.
[198] Paul Craig, 'The Treaty of Lisbon, process, architecture and substance' (2008) 33 European Law Review 137.
[199] Richard Whish & David Bailey, *Competition Law* (7th ed. Oxford University Press 2012).
[200] Treaty on the Functioning of the European Union, art 101.
[201] Treaty on the Functioning of the European Union, art 102.
[202] European Commission, 'Competition Policy Brief, To Commit or not to Commit? Deciding between prohibition and commitments' (European Commission, 15 April, 2021) <https://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf.> accessed 18 November 2021.
[203] Jean-François Bellis, 'EU Commitment Decisions: What Makes Them So Attractive?' (OECD, 11 April, 2021) <https://one.oecd.org/document/DAF/COMP/WD(2016)53/en/pdf.> accessed 16 November 2021.
[204] Id.
[205] Dominique Costesec, 'Has the Commission Kicked its Addiction to Commitment Decisions?' (Kluwer

more than 90% of the non-cartel cases being resolved by way of commitments.[206] One of the first cases resolved by way of offering commitments was the case of *Commission v. Alrosa*[207] where the Commission instituted investigations to assess whether De Beers' long-term purchase relationship of rough diamonds with its competitor *Alrosa* was in contravention to Article 101 and 102 of the TFEU.

The General Court was essentially tasked with either allowing or terminating extreme remedial discretion exercised under Article 9 commitment decisions by deciding whether they should be held to the same standard of proportionality as required under Article 7 prohibition decisions.[208] To this end, the General Court answered in the affirmative, holding that the Commission could only secure the least onerous outcome that addressed its concerns.[209]

However, the observations of the General Court was short-lived since, on appeal, the European Court of Justice ('ECJ') overturned the findings of the General Court and endorsed the Commission's administrative discretion to secure *any* remedial outcome it deemed fit.[210] This ruling by the ECJ received considerable criticism to the extent that some scholars even labelled it as the 'worst decision in the history of the ECJ'.[211] This is because the ECJ missed the opportunity to set a ceiling on what could be considered as a meaningful limit to the discretionary powers that lay with the Commission. The vast majority of staccato decisions that the Commission took through Article 9 made it even more convoluted for businesses to know how the Commission would address a particular violation especially in areas where there was a lack of judicial guidance in the form of precedents.

Competition Law Blog, 28 June, 2016) < http://competitionlawblog.kluwercompetitionlaw.com/2016/06/28/has-the-commission-kicked-its-addiction-to-commitments-decisions/> accessed 18 November 2021.

[206] Wouter P.J. Wils, 'Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?' (Concurrences Journal, 5 June, 2015) <https://www.researchgate.net/publication/280313836_Ten_Years_of_Commitment_Decisions_Under_Article_9_of_Regulation_12003_Too_Much_of_a_Good_Thing> accessed 15 November 2021; Geradin and Mattioli, 'The Transactionalization of EU Competition Law: A Positive Development?' (2017) 8 Journal of European Competition Law & Practice 634.

[207] *Commission v Alrosa* (2010) 5 CMLR 643.

[208] Kellerbauer, 'Playground Instead of Playpen: the Court of Justice of the European Union's Alrosa Judgment on Art.9 of Regulation 1/2003', (2011) 32 European Competition Law Review 1–8.

[209] *Alrosa Company Ltd. v Commission* (2007) 5 CMLR ¶ 92–111.

[210] *Alrosa Company Ltd. v Commission* (2007) 5 CMLR ¶ 377.

[211] Jenny, 'Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions' (2015) 38 Fordham International Law Journal 770.

III. CONSENT DECREES IN THE UNITED STATES

The US follows a dual antitrust enforcement structure where the Department of Justice ('DoJ'), as well as the Federal Trade Commission ('FTC'), can enter into settlements with violators of US antitrust law.[212] These settlements are formally called '*consent decrees*' at the DOJ and '*consent orders*' at the FTC.[213] Similar to the EU, the substantial use of consent decrees in the US is a reflection of its mutual benefits to both parties to the dispute. Protracted litigation imposes an enormous burden on the companies costing them exorbitant legal fees, bad publicity etc. which ultimately leads them to seek consent decrees if they feel their case is not strong enough. For the Government, such settlements are attractive since they save resources and resolve cases far quicker than the litigious route.[214]

Essentially, a consent decree symbolizes a consensus between the Government and the suspect to resolve an undecided antitrust dispute. The suspect agrees to the specific limitations for their future course of conduct and in return, the Government shows its willingness to terminate the suit on such agreed terms. The DOJ negotiated its first settlement in the year 1906[215] however, it was only after the introduction of the Clayton Act in 1914 that the mechanism came to be used with increased frequency.[216] Presently, the Antitrust Procedures and Penalties Act, 1974 also known as the '*Tunney Act'* expressly provides for such a mechanism.[217]

The procedure envisaged under the Tunney Act is strikingly different when compared to the model followed in the EU. The Tunney Act requires that the US publish a 'Competitive Impact Statement' and the Final Judgment in the Federal Register. Subsequently, a summary of the terms of the proposed Competitive Impact Statement and the Final Judgement is published in certain newspapers at least sixty (60) days prior to entry of the proposed Final Judgment. This notice is released with the objective of inviting comments from the members of the public regarding the proposed Final Judgement to the Antitrust Division of the Department of Justice of the United

[212] Alden F. Abbott, 'A Brief Overview of American Antitrust Law', (The University of Oxford Centre for Competition Law and Policy, 1 January, 2021) <https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l_01-05_1.pdf.> accessed 15 October, 2021.
[213] Daniel L. Rubinfeld, *Antitrust Settlements, The Oxford Handbook of International Antitrust Economics* 173 (Oxford University Press, 2015).
[214] Dabney, 'Antitrust Consent Decrees: How Protective an Umbrella?' (1959) Yale Law Journal 139.
[215] *United States v Otis Elevator Co.*, Decrees & Judgements in Fed. Antitrust Cas. 107 (1906).
[216] George Stephanov Georgiev, 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law', (2007) Utah Law Review 971.
[217] Antitrust Procedures and Penalties Act 1974, s 5.

States.[218] Thereafter, during the sixty-day period, the US will assess, and at the end of that period respond to any comments that it has received. It will then publish the comments and responses of the US in the Federal Register. Post the completion of the sixty-day period, the US will file with the Court the comments and its own responses, and it may request the Court to enter the proposed Final Judgment. If the US requests that the Court enter the proposed Final Judgment after compliance with the Tunney Act then the Court may enter the Final Judgment without a hearing, provided that the Court is of the considered opinion that the Final Judgment is in the public interest and adequately addresses the antitrust concerns.[219]

The aforementioned procedure of the Tunney Act aims to provide a robust framework for judicial reviews of antitrust consent decrees. This is because the legislative intent of the Tunney Act, as outlined in the Congressional Findings and Declarations of Purposes, states in clear terms that the Tunney Act was enacted to introduce a robust mechanism of providing judicial review to antitrust consent decrees and to ensure that such consent decrees are in public interest whilst ensuring that judicial reviews are not watered down to mere rubber stamps.[220] While the Tunney Act prescribes a framework that appears to be superior in terms of robustness of procedure, the Act also suffers from several infirmities. One such infirmity came to light in the landmark case of United *States v. Microsoft*[221] where the tech giant was accused of safeguarding its operating system monopoly and seeking a new monopoly for its browser: "The Internet Explorer". The district court denied its approval to the consent decree because the court could not conclude to their satisfaction that the decree was in public interest. The court's primary objection was that the proposed consent decree did not address several antitrust concerns which were *not alleged* in the complaint.[222]

Subsequently, the Court of Appeals answered the novel question of whether the judge can reject a decree if it does not address the antitrust concerns *not raised* in the complaint in the negative. The Appellate Court held that, the issues referred to in the Tunney Act are only those which are part of the initial complaint and not what the court formulates at a later stage. It is important to

[218] Fredrick S. Young, 'United States Explanation of Consent Decree Procedures' US Department of Justice, (26 July 2019) < https://www.justice.gov/opa/press-release/file/1187716/download> accessed 28 May 2022.
[219] Lawrence M. Frankel, 'Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees' (2008) Antitrust Law Journal 550.
[220] Kevin R. Sullivan, 'Motion to Participate as Amicus Curiae', US Department of Justice, (8 February 2006) < https://www.incompas.org/files/tunney_feb8_2006.pdf> accessed on 28 May 2022.
[221] *United States v Microsoft* 253 F 3d 34 (D.C. Cir. 2001).
[222] Lawrence M. Frankel, 'Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees' (2008) Antitrust Law Journal 550.

consider at this juncture that this dispute arose due to the unclear text used in the statute itself. The Tunney Act provides for judicial review of consent decrees and requires them to be in the public interest however it fails to outline a definition of what would constitute public interest for the purposes of review nor does it provide any other form of guidance to judges to make an evaluative opinion on the same.

Nonetheless, the framework envisaged by the Tunney Act, albeit not perfect, serves a valuable deterrence goal while at the same time ensuring the participation of courts to maintain checks and balances and ensure that the competition regulator does not end up abusing their administrative discretion. Moreover, it also provides considerable guidance on how courts can be included in the ad hoc decision-making process by embedding judicial review of such orders in the text of the statute itself.

IV. THE ADMINISTRATIVE APPEAL FOR INTRODUCING COMMITMENT DECISIONS

There is an incontestable allure that comes with commitment decisions which explains why the competition regulators in foreign jurisdictions have relied on them heavily since their introduction. They provide a potent tool for realizing the policy goals with the highest efficiency. This efficiency is a direct corollary of the extensive administrative discretion that commitment decisions provide.

The model for commitment decisions embedded in the TFEU through Article 9 provides the Commission with unrestrained powers, the exercise of which allows it to pursue its policy objectives. This equips the Commission with the discretionary power to assess every case individually and implement the competition policy *above the law* i.e., by going ahead of the legislative standards through the application of novel theories of harm[223] as well as *below the law* by providing added leeway from the prescribed legislative standards in cases wherever appropriate. Viewed in this light, the Indian competition regulator can be ahead of the curve in emerging areas such as blockchain technologies where it can implement novel theories of harm[224] while not being constrained by legislative limitations to address emerging issues. Similarly, it can address issues that do not have a significant impact on the market by enforcing commitments that

[223] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[224] Geoffrey Manne, 'Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins' (2020) George Mason Law Review 1279.

are below the law since commitment decisions are intended to provide a system of cooperative resolution of cases in the first place.

An opposite example of this can be the landmark case of *United Brands v. Commission*[225] which laid down the test for '*excessive pricing*' which had no reasonable relation to the economic value of the product supplied by itself or when compared against competitive standards prevalent in the market. The implementation of this test in subsequent cases has been a major hindrance in adjudicating prohibition decisions for decades.[226] However, the administrative flexibility that commitment decisions provide would in such a situation allow for better resolution of cases where the Commission is not constrained by previous decisions.

Moreover, commitment decisions allow for market interventions against particular companies as and when the Commission sees fit regardless of the legal novelty or the magnitude of its concerns. This invariably allows the Commission a 'free hand' to fix the inconsistencies and realign the market whenever the occasion arises.[227] Scholars have also suggested that the European Commission(s) have used commitment decisions to secure remedies that may not have succeeded in formal litigations.[228] At first view, this administrative flexibility sounds appealing considering its endless possibilities in competition enforcement. Nonetheless, this administrative flexibility does not come without its costs. Having acknowledged the seemingly endless possibilities that are afforded through administrative flexibility, the central purpose of this article is to explore the problematic consequences of this means of market intervention. Simply put, the prioritization of effective policy goals through unbridled administrative flexibility represents a repudiation of the formal rule of law to which the article now turns.

V. COMMITMENT DECISIONS VIS-A-VIS THE RULE OF LAW

Perhaps the strongest argument advanced against the reliance on commitment decisions is the fact that they fail to develop the law and the jurisprudence that emerges as a result of judicial decision making. Professor Ryan Stones proposed the argument that the legal uncertainty that

[225] *United Brands and United Brands Continental v Commission* (1978) 1 CMLR 429.
[226] Dunne, 'Commitment Decisions in EU Competition Law', (2014) 10(2) Journal of Competition Law & Economics 422.
[227] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[228] Rab and Sukhtankar, 'Alternative Competition Law Enforcement in Energy: The Application of Commitments under Article 9 Regulation 1/2003 in the Energy Sector', (2008) 17(6) Utilities Law Review 199–201.

emerges as a direct corollary of commitment decisions is also antithetical to the formal understanding of the rule of law as conceptualized by the works of scholars such as Fuller[229] and Hayek.[230] Professor Stones' central argument states that the rule of law at its core seeks to establish an institutional framework that approximates normative obligations.[231] Therefore, for its effective implementation, it requires a harmonious system that ensures three primary objectives. *Firstly,* there must be normative comprehensibility i.e., legal subjects must be able to comprehend their rights and their obligations. *Secondly,* there must exist generalized norms of equal application which essentially means that there must be an equal application of the law and all similar instances coming within their reach should be treated equally and consistently and *lastly,* there must be a system of independent review of the equally applied law for checking the legal validity as well as for reviewing substantive compliance of decisions which is usually entrusted with courts.[232]

The argument proposed by Professor Stones is not only essential for the day-to-day functioning of an effective legal system guided by the rule of law like ours but it also finds justification in economic theory which assumes critical importance in the domain of competition policy. New institutional economic theory proposes that the effectiveness of law as an institution diminishes if it cannot be comprehended by its subjects.[233] Moreover, normative stability is lost when the legal determination is carried out through ad hoc, singular interventions rather than equal application of law.[234] Since the first two limbs of the formal rule of law i.e., normative comprehensibility and fixed generality of norms are incapable of perfect realization,[235] the third limb i.e., judicial review by courts assumes significance. The third limb of judicial review not only provides a second chance to examine the correct application of legal principles but also empowers the courts to establish clearer and generalized legal norms instead of context-specific determinations which are bound to result in legal uncertainty over time.

Such a legal system that aspires towards realizing the formal rule of law aligns with the vision of the Supreme Court of India which on several occasions has stressed on the importance of rule of law and its indispensable role in the effective functioning of our democratic republic. For

[229] Lon L. Fuller, *The Morality of Law*, (Rev. Edn Yale University Press, 1969).
[230] F.A. Hayek, *Law, Legislation and Liberty*, (1st Edn Routledge, 2013).
[231] Martin Loughlin, *Foundations of Public Law*, (1st Edn Oxford University Press, 2010).
[232] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[233] Kasper and Streit, *Institutional Economics: Social Order and Public Policy* (1st Edn Edward Elgar, 1998).
[234] F.A. Hayek, *Law, Legislation and Liberty*, (1st Edn Routledge, 2013).
[235] Id.

instance, in *K.T. Plantation (P) Ltd. v. State of Karnataka*,[236] the Supreme Court stated the following:

"The rule of law, as a concept, finds no place in the Constitution but has been characterized as a basic feature of the Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament. The rule of law is one of the most important aspects of the doctrine of basic structure."[237] (emphasis added)

In the same vein, the Supreme Court in *State of West Bengal v. Debasish Mukherjee*,[238] expounded on the importance of judicial review in the following words:
"In a democracy, governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases. Where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review"[239] (emphasis added)

Based on the foregoing, it would be fair to say that the aspirational values of the formal rule of law and the argument proposed by Professor Stones squarely aligns with the views of the Supreme Court of India. A departure from these values would invariably result in a systemic degradation of legal comprehensibility as well as normative certainty for individuals and businesses alike. Collectively, this would lead to a situation that is not in sync with the vision of a country founded upon the rule of law.

VI. POSITION HITHERTO IN INDIA

The Competition Act has been in operation for a little more than a decade now in India and has constantly evolved following the footsteps of other established jurisdictions such as the EU and the US. While there have been very few cases that have discussed the possibility of preliminary resolution of the case by offering structural or behavioural changes in the form of commitments or settlements, there is some guidance offered by judicial precedents. The CCI in the case of *In Re: M/s Royal Agency v. Chemist and Druggist Association*[240] observed that commitments and similar ad hoc mechanisms for the resolution of cases are not envisaged within the scheme of the

[236] *K.T. Plantation (P) Ltd. v State of Karnataka*, (2011) 9 SCC 1 ¶ 211.
[237] Id.
[238] *State of West Bengal v Debasish Mukherjee* (2011) 14 SCC 187 ¶ 35.
[239] Id.
[240] *In Re: M/s Royal Agency v Chemist and Druggist Association Goa* Case No. 63 of 2013 ¶ 23.

Act.[241] However, in *Tamil Nadu Film Exhibitors Association v. CCI*,[242] the Madras High Court held that cases can be resolved by offering settlements and the same would fall within the scheme of the Act under Section 27(g) since it provides residuary powers to the CCI. The sub-section gives the CCI the power to pass *"Any other order or issue such directions as it deems fit"* that have not been enumerated in the Section to meet the ends of justice. Additionally, the Supreme Court has already held that the powers conferred upon the CCI are of a wide magnitude to achieve the objective of the Act and ensure its proper implementation.[243] Moreover, the jurisprudence concerning ad hoc decision making is not entirely new to the Indian legislative framework, especially for quasi-judicial bodies. The Securities and Exchange Board of India ('SEBI') has already introduced its settlement proceedings regulations. Similar mechanisms are also provided for under the Income Tax Act[244] and the Central Excise Act[245] which suggest that different regulators in the country are headed into a more settlement-friendly regime.[246]

VII. DRAFT COMPETITION ACT (AMENDMENT) BILL 2020: AN ANALYSIS

The Competition Law Review Committee ('CLRC') constituted by the Ministry of Corporate Affairs ('MCA') took cognizance of the Madras High Court judgement[247] and observed that on a plain reading of Section 27[248], it does not expressly envisage a settlement or commitment procedure within the framework of the Act.[249] Subsequently, the proposed amendment bill for providing legal architecture to commitments and settlements seeks to insert Section 48A and 48B respectively under the existing legislative framework.[250] As per the bill, contrary to the position of commitment applications, settlements may be entered into by the parties after the Director-General ('DG') presents the report of the investigation to the CCI and concerned parties, but before the Commission makes the final decision.[251] This suggestion is inherently problematic considering that the DG would invariably be utilizing the resources of the Commission as well as require sufficient time to reach a conclusive decision. Therefore, this mechanism not only adds

[241] Id.
[242] *Tamil Nadu Film Exhibitors Association v CCI* (2015) 2 Competition Law Review 420 ¶ 27.
[243] *Competition Commission of India v SAIL* (2010) SCC 744 ¶ 86.
[244] Income Tax Act 1961, s 245B.
[245] Central Excise Act 1944, s 32E.
[246] SEBI (Settlement Proceedings) Regulations, 2018.
[247] *Tamil Nadu Film Exhibitors Association v CCI* (2015) 2 Competition Law Review 420.
[248] Competition Act 2002, s 27.
[249] CCI, 'Competition Law Review Committee Report' (Competition Commission of India, 10 July, 2019) <https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf.> accessed on 20 November 2021.
[250] Ashu Bhargav, 'Settlements and Commitments in the Indian Competition Regime: Construing Practicality' (IndiaCorpLaw 29 March, 2020) <https://indiacorplaw.in/2020/03/settlements-and-commitments-in-the-indian-competition-regime-construing-practicality.html.> accessed on 9 October 2021.
[251] Competition (Amendment) Bill 2020, s 48B.

an additional layer of procedural burden on the participants but also does little to save time and resources which is one of the primary reasons why businesses as well the Commission would want to pursue these mechanisms in the first place.

Moreover, similar to the model followed in the EU, the proposed bill accords the Commission wide discretionary powers to assess the "*nature and gravity*" of the contraventions and accordingly accept or reject the proposals advanced by businesses.[252] Notably, the bill does not enlist any grounds on the basis of which the Commission can decide whether the proposed commitments adequately address the competition concerns nor does it require any statement, such as the '*Competitive Impact Statement*' prescribed under the Tunney Act, by the suspect which could be used for public scrutiny. Further, the proposed bill also expressly rejects the possibility of judicial review as it clearly states[253] "*No appeal shall lie under section 53B*[254] *against any order passed by the Commission under this section.*" As the previous section highlights, granting such a wide degree of administrative flexibility would only lead to a situation of diminished normative certainty for businesses but also directly contribute towards systemic degradation of legal comprehensibility. Collectively, such a legal architecture would fail to realize the formal rule of law ideal.

VIII. CONCLUSION

It is an undisputed fact that the introduction of a commitments and settlements framework would result in procedural economy and faster resolution of antitrust disputes. As the article highlights, they would also equip the Commission to regulate the market based on their ideal vision since they would not be constrained by the limits imposed by the legislative text. However, this article has argued that such a form of market regulation especially when done prematurely can end up doing more harm than good. It is also important to consider that even advanced antitrust jurisdictions such as the EU and the US introduced such procedures for ad hoc decision making after a considerable period of time (few decades) post the enactment of the parent Act, whereas the Competition Act has only been in operation for a little more than a decade. Keeping in mind the nascent stage of antitrust jurisprudence in India it is important that not a lot of cases are closed by commitments as that would eliminate independent judicial determination of the legal issues involved in these cases. This assumes greater importance, especially in emerging areas where there is a lack of guidance in the form of judicial precedents.

[252] Id.
[253] Competition (Amendment) Bill 2020, s 48A (6) and s 48B (6).
[254] Competition (Amendment) Bill 2020, s 48B.

In conclusion, it is critically important that the Indian Parliament does not repeat the same mistakes its counterparts have made in the enforcement of competition law. The proposed bill must be recalibrated and include the best of the EU and the US models by implanting a mechanism of judicial review and limiting the unbridled administrative flexibility given to the competition regulator. If the Indian Parliament must introduce a mechanism of ad hoc decision making to resolve antitrust cases, it must not be at the cost of the rule of law ideal otherwise the foundational principles of our constitution would ring hollow.

DEAL-VALUE THRESHOLD: REVISITING TRADITIONAL THRESHOLDS FOR MERGER CONTROL

- *MR. ANUBHAV SINHA AND MR. NIPUN KUMAR*[*]

ABSTRACT

In India, there has been a significant rise in mergers and acquisitions in the digital market, most of which have a potential of escaping the scrutiny of the Competition Regulator, thus giving rise to antitrust concerns. In most cases of mergers and acquisitions in digital markets, the turnover and asset of the amalgamated entity or the target entity are so low that they do not require notification to the Competition Regulator. Thus, the crucial stage of antitrust review by the regulator does not take place which means that even potential AAEC causing transactions are also completed. In this note, an attempt has been made to discuss the causes behind the above-mentioned loophole in the Indian merger control regime and the various theories of harm that arise with it. The authors propose that Deal Value Threshold ["DVT"] can be adopted to fix the loophole in the present regime. The authors discuss how various parameters under DVT should be set for an efficient merger control in India so that potentially anti-competitive mergers/acquisitions do not escape the Regulator's scrutiny. Furthermore, the authors suggest that there should be a provision for an ex-post review of mergers so that if a potentially anti-competitive merger/acquisition escapes the threshold set under DVT, it can be investigated by the Regulator at a later stage post the completion of the merger.

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I. INTRODUCTION

The 21st Century has witnessed the rise of some of the biggest tech companies[255] in all the sectors globally. With similar developments in India, it is expected to become one of the biggest markets for tech companies.[256] With the advancement in technology and digital markets, the companies have diversified their portfolio and have ventured into various new sectors, especially through digital markets. Such rapid growth has incepted huge opportunities for the entities in digital markets which in turn has boosted the activity of mergers and acquisitions involving companies that engage in providing online services.[257] In the light of the rise in mergers and acquisitions of corporate entities, it has been observed that big and established online service providers tend to acquire small and budding companies that might pose a threat to the established entity in the future (e.g. Facebook's acquisition of Instagram).[258] The fate of such new entrants hangs on a thin thread held on by the established players. In the last 10 years, the top five big-tech companies (Amazon, Apple, Facebook, Google, and Microsoft) have engaged in more than 400 acquisitions globally.[259] This unprecedented activity of mergers and acquisitions taking place in the digital market calls for a robust merger control regime concerning digital markets, given that there is a fair chance that such transactions may end up being detrimental to the consumers if the loopholes in the present merger control regime are not addressed.

II. NEED FOR CHANGES IN THE PRESENT MERGER REGIME

The major challenge faced by competition authorities in different jurisdictions is that their merger control regime is not designed to scrutinize mergers and acquisitions in digital markets and it is for this reason that most of such mergers are completed without antitrust scrutiny. The big-tech companies, in the last 30 years, have consummated over 800 acquisitions, with 32 acquisitions

[255] Manyika J and Tuin M, 'It's Time to Build 21st Century Companies: Learning to Thrive in a Radically Different World' (12 May 2020) <https://www.mckinsey.com/mgi/overview/in-the-news/its-time-to-build-21st-century-companies> last accessed 28 October 2021.
[256] Economics Times 'McKinsey Says Indian IT Industry to Touch $300-350 Billion in Five Years' (18 February 2021)<https://economictimes.indiatimes.com/tech/technology/mckinsey-says-indian-it-industry-to-touch-300-350-billion-in-five-years/articleshow/81093397.cms> last accessed 28 October 2021.
[257] Global Data 'Race for Technology Mergers amid Digitalization Spree Brings Global M&A Value over $1 Trillion in Q2 2021' (August 3, 2021)
<https://www.globaldata.com/race-technology-mergers-amid-digitlization-spree-brings-global-ma-value-1-trillion-q2-2021-says-globaldata> last accessed 28 October 2021.
[258] CMA "Digital Markets Strategy- GOV.UK" (July 2019)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf> last accessed 28 October 2021.
[259] ibid.

having a value of more than 1 billion US Dollars.[260] The Federal Trade Commission ["**FTC**"], in its 2021 study discovered that the big-tech made 616 non-notifiable transactions of value more than $1 million each from 2010 to 2019.[261] Moreover, the FTC, at the backdrop of this study accused the big-tech of exploiting the loopholes for avoiding antitrust scrutiny,[262] and noted that there is a need to *'plug gaps'* in the existing framework.[263] In the UK, from 2015 to 2020, over 250 mergers involving the big-tech were concluded where not one of them was blocked or approved subject to conditions by the Competition and Markets Authority ["CMA"] for potential antitrust concerns, indicating that there has been an *'under enforcement of digital mergers.'*[264] Similarly in India, the acquisitions of Freecharge by Snapdeal, Myntra by Flipkart, and WhatsApp by Facebook,[265] were made by established players of the market and were consummated without antitrust scrutiny. Looking into the above-mentioned scenario, it is apparent that there is an urgent need of regulating mergers and acquisitions in the digital markets failing which, various theories of harms may arise which have been discussed later in this note.

III. MERGER CONTROL IN INDIA

In India, mergers are governed by the Competition Act, 2002 ["**the Act**"] and its allied Regulations. Mergers, acquisitions, and amalgamations that breach the thresholds set under Section 5 of the Act,[266] are referred to as 'Combinations', and are required to be notified to the competition watchdog, i.e. the Competition Commission of India ["**the Regulator**"] for its approval.[267] The Regulator is vested with the role of scrutinising every notified combination for

[260] 'Visualizing Tech Giants' Billion Dollar Acquisitions' (5 May 2020) <https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic/> last accessed 22 March 2022.
[261] 'Non-HSR Reported Acquisitions By Select Technology Platforms, Federal Trade Commission' (USA Federal Trade Commission, September 2021) <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf> last accessed, 2 March 2022, page 36.
[262] 'Non-HSR Reported Acquisitions by Big Tech Platforms, Prepared Remarks of FTC Commissioner Rohit Chopra' (USA Federal Trade Commission, 15 September 2021) <https://www.ftc.gov/system/files/documents/public_statements/1596340/20210915_final_chopra_remarks_non-hsr_reported_acquisitions_by_big_tech_platforms.pdf> last accessed, 2 March 2022.
[263] 'Non-HSR Reported Acquisitions By Select Technology Platforms, Remarks Of Chair Lina M khan'(USA Federal Trade Commission, 15 September 2021) https://www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf last accessed, 2 March 2022.
[264] 'Digital Competition Expert Panel (UK) 'Unlocking Digital Competition: Report of Digital Competition Expert Panel' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> last accessed 28 October 2021, para 3.43. [Hereinafter, *DCEP*].
[265] 'Ministry of Corporate Affairs Report of Competition Law Review Committee' Chapter 7: Combinations (Ministry of Corporate Affairs Government of India, July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> last accessed, 28 October 2021, page 132 [Hereinafter, *CLRC Report*].
[266] Competition Act, 2002, Section 5.
[267] Competition Act, 2002, Section 6.

any potential anti-competitive concerns that may arise owing to that combination. It is important to note that the notification thresholds as set under the Act are strictly based on the combined asset and turnover of the combining parties/ group.[268] However, this criterion of determining the threshold may not be best suited for present-day technology driven mergers because the entities involved may have a potential of causing Appreciable Adverse Effect on Competition ["AAEC"] and still not breach the thresholds set under Section 5. In most acquisitions in the digital market, the target enterprise may not create a huge asset base and turnover,[269] and not generate "*any significant revenue*" for years,[270] owing to its offering of free products and/or services and priority on creating a user base.[271] Since the revenue of such targets is significantly less, their acquisition either completely escapes the thresholds set under Section 5 or gets the benefit of *de minimis* exemption.[272] Therefore, determining the value of digital companies based on turnover and assets may not be effective. Hence, in order to bring such mergers under the ambit of the Regulator's scrutiny, a broader approach needs to be adopted for the determination of the threshold so that the actual value (including future ramifications) of the proposed merger/acquisition is reflected in calculating the value of the combined entity.

Additionally, Section 20(1) of the Act,[273] limits the power of the Regulator to inquire into transactions covered exclusively by Section 5. Therefore, even if a merger/acquisition prima facie appears to be anti-competitive, the Regulator cannot conduct an investigation into it.

IV. THEORIES OF HARM

Since these mergers, which are mostly data-driven, escape the scrutiny of competition authorities, potential AAEC concerns that may arise in the future go unaccounted for. The consequence of these unaccounted mergers is that the acquirer may end up with an unreasonable advantage over its competitors, thus, paving the way for the merged entity to become dominant. For instance, in cases of mergers in digital markets, the acquirer, by getting access to the user base of its target,

[268] Competition Act, 2002, Section 5.
[269] CLRC Report (n 11) page 128.
[270] 'Digital Competition Expert Panel (UK) 'Unlocking Digital Competition: Report of Digital Competition Expert Panel' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> last accessed 28 October 2021, para 3.62.
[271] CLRC Report (n 15).
[272] 'Ministry of Corporate Affairs Notification' S.O. 675(E) (4 March 2016) <https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf> last accessed, 28 October 2021.
[273] Competition Act, 2002, Section 20(1).

can easily expand the market reach of the combined entity, which may end up making such entity dominant in the market, thus giving rise to AAEC concerns.[274]

Because acquisitions in the digital market have a scope of escaping the competition regulator's scrutiny, two probable theories of harm arise: a) killer acquisitions; and b) nascent potential competitors.[275] Killer acquisition is a theory of harm where an incumbent firm acquires the target to *'discontinue the development of the target's innovative projects and pre-empt future competition'* because the target's product competes with the incumbent's product and is thus perceived as a competitive threat.[276] In some cases, the incumbent firm may discontinue its own line of product after acquisition and continue with the target's product.[277] In a nutshell, killer acquisitions tend to terminate the development of the product of either the acquirer or the target so that only one product reigns in the market.[278]

In the case of nascent potential competitor theory of harm, the acquirer aims at eliminating competition from the target while the product continues in the market by simply buying the target.[279] Since, the acquirer can take decisions on price, quality, and innovation of the concerned product,[280] it eventually gains overarching control over the target's product, thus killing the competition automatically.[281] In the recent past, the acquisitions of Freecharge by Snapdeal, Myntra by Flipkart, and WhatsApp by Facebook were executed with the intent of *'eliminating potential threat'* from the target,[282] and it shows how the nascent competitor theory of harm came into play with the target's product not getting killed by the acquirer.

The two above-mentioned theories of harm highlight the imperative need for the regulation of mergers in the digital sector, in the absence of which big-tech companies will continue to weed out competition by acquiring small and budding businesses without being held accountable. It is for these reasons that the CLRC has recommended the provision of Deal Value Threshold for

[274] DCEP (n 16) para 1.75.
[275] Yun John M, 'Potential Competition, Nascent Competitors, and Killer Acquisitions' (2020). The Global Antitrust Institute Report on the Digital Economy 18, SSRN Electronic Journal: <https://ssrn.com/abstract=3733716> last accessed, 28 October 2021.
[276] Cunningham, Ederer, and Ma, 'Killer Acquisitions' (2021) vol. 129, issue 3, 649 - 702.
[277] Pike C, 'Start-Ups, Killer Acquisitions and Merger Control' (2020). SSRN Electronic Journal. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597964> last accessed, 28 October 2021 para 7. [Hereinafter, *Pike C*].
[278] ibid. para 9.
[279] ibid para 15.
[280] ibid para 192.
[281] ibid para 17.
[282] CLRC Report (n 11).

merger notification.[283] In the following section, the authors will discuss the important aspects of deal-value threshold and provide an outline of how Deal Value Threshold should be implemented in the Indian competition regime.

V. IMPLEMENTATION OF DEAL VALUE THRESHOLD

Deal Value Threshold ["DVT"] is a deviation from the traditional turnover and asset-based criteria for determining whether a merger/acquisition is required to be notified to the competition authority for its approval. Since target companies that form a part of the digital market may not have a huge asset base and a significant turnover, judging whether the acquisition of such targets is notifiable or not based on their turnover and asset may not be effective. The European Parliament in its study had noted that the turnover criteria for such target entities is not a practical metric to measure their size.[284] DVT attempts to overcome this shortfall by setting a new threshold that takes into account the transaction value and the domestic presence of the target companies, where merger activities breaching the threshold would be liable for notification and approval from the competition regulator. DVT ensures that potential anti-competitive combinations involving targets not having significant turnover and assets do not escape the scrutiny of the competition regulator. Given that there is a grave importance of an efficient merger control in digital markets, the inclusion of DVT has been provided in the Competition (Amendment) Bill, 2020,[285] under the proviso to Section 5 of the Act, however, the Bill has not been enacted as law until now.

VI. ASPECTS TO BE COVERED UNDER DVT

This note aims at laying down the methodology of implementing DVT in India. In our opinion, the Deal value Thresholds for the purpose of merger control must be inclusive of the following heads:

A. Monetary Threshold

For a combination to be notified for investigation there is a requirement of a threshold to be breached as per Sections 5 and 6 of the Act. Along similar lines, a threshold is also required for

[283] ibid para 5.12.
[284] European Parliament," *Challenges for Competition Policy in a Digitalized Economy*, (July 2015) 60.
[285] Competition (Amendment) Bill, 2020.

mergers/acquisitions in the digital market which would consider the true economic value of a combination and not just the turnover and asset of the parties involved. The German and Austrian competition regulators had released a Guidance Note ["**the Note**"] for the newly introduced transaction value threshold where one of the concerns that was explained by the Note was 'Value of Consideration'.[286] The Note states that value of consideration is an accumulation of 'all assets and other monetary benefits' that a seller receives from a buyer in a particular merger,[287] and if that value reaches a certain predetermined threshold, then the merger would be liable for notification.[288] The Note clarifies that the asset involved should be interpreted broadly and must contain all cash payments and the transfer of voting rights, securities, tangible assets and intangible assets, contingent considerations and payments for non-competition if any. For the calculation of value, the Note emphasises that it is imperative to differentiate between the company value calculated on the basis of business methods and the purchase price and consideration value for a company.[289] This distinction is especially important where the target is bought at a much higher price than its actual company value, for instance, in the Facebook-WhatsApp merger case.[290] This significant difference between the two values indicates that the target may have some unlocked potential that the buyer can anticipate and use the same to disrupt the relevant market and thus cause AAEC. Therefore, while ascertaining whether a particular merger breaches the threshold or not, only the consideration value of the said merger must be taken into account and not the company value of the target.

While assessing the value of consideration, there are two aspects that the merging parties should keep in mind, which the CLRC Report of 2019 had also pointed out:[291]

- Fluctuations in the value of consideration, and
- Future payments

i. <u>Fluctuations in the value of consideration</u>:

The value of consideration may fluctuate over time owing to the securities (e.g. shares) involved in the transaction. The traditional turnover criterion for notifying mergers does not cater to this problem because the assessment is done over a period of time and not on a particular date.

[286] Bundeskartellamt/BWB, *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification*, para 11 [Hereinafter, *BWB*].
[287] ibid.
[288] ibid para 8.
[289] ibid para 12.
[290] Pike C (n 23) page 14.
[291] CLRC Report (n 11) page 133.

Therefore, it is essential that a relevant date be determined on which the value of the variable securities is to be taken into account. The Note on this account states that the completion date of the merger can be regarded as the relevant date.[292] However, this method of fixing the date may not work in cases where there is a fluctuation in the value of consideration at the time of notification. For such cases, the Note provides that the value of consideration must "relate to the time the notification requirement was reviewed by the parties to the merger".[293] And accordingly, parties may withdraw the notification if the value is below the threshold otherwise they may be obligated to notify the merger if the value crosses the threshold.[294] It is important to highlight that the option of withdrawal that the parties get after notifying their concerned merger is a dynamic advancement in merger regulation as it avoids unnecessary inquiry of benign mergers by the Regulator. The authors believe that this option of withdrawal should necessarily be adopted in the Indian regime so that parties to such mergers can withdraw their notification and conclude the transaction in a lesser time frame.

ii. Future payments:

The CLRC, in its report, had highlighted the need to specifically deal with parts of consideration that are to be paid at different times such as earn-outs,[295] and payments that are contingent on 'realisation of certain turnover' or 'profit targets' in the future.[296] The Note, for such payments, suggests that the current value of future payments must be considered for the calculation of value of consideration which may be calculated on the basis of discounting methods.[297] The authors believe that the parties to the merger should be given discretion in choosing the method for estimating the current value of future payments. However, the Regulator should be required to ensure that there is transparency in the method of calculation adopted by the parties.

For the Indian merger control regime, the thresholds under DVT can be set on the basis of value of consideration of a transaction and wherever it crosses the threshold, it should require notification to the Regulator. Moreover, even those transactions should be made notifiable whose value of consideration falls short of the threshold by a marginal amount given that the merger control regime in India has little experience concerning data-driven/digital mergers and there is

[292] BWB (n 32) para 18.
[293] ibid.
[294] ibid.
[295] CLRC Report (n 37).
[296] BWB (n 32).
[297] ibid para 30.

no conclusive report on the effectiveness of DVT. This flexibility in DVT will ensure that potential anti-competitive mergers do not escape the Regulator's scrutiny merely because they fall short of the threshold by a marginal amount.

B. Qualitative Parameters

Since the concept of DVT is new and its formulation is at a budding stage, mere fixation of a monetary threshold may not be adequate in preventing potential anti-competitive mergers. Therefore, to effectively regulate data-driven/digital mergers, there is a requirement for some more parameters on which the business of the nascent target entity may be evaluated which would further help in determining whether the acquisition of such targets needs to be investigated. The parameters will also assist in determining the domestic presence of a target which has been highlighted in the Note,[298] as well as in the CLRC report.[299] The parameters are discussed below:

i. User Base

The user traffic generated by a target entity becomes relevant when it is an online service provider. The popularity of the target based on user base can help determine the extent and potential of its business and thus, apparently, the market presence which would further make comparison with the target's competitors convenient. Since the turnover criteria for such target entities is not a practical metric to measure their size, a broader method for the calculation of the same is needed. The same can be calculated accurately by examining the *'number of users together with an estimation of the size of the network effects.'*[300]

User base can be computed on the basis of *'monthly active users', 'daily active users', 'number of registered users',* and *'unique user.'* Unique user for a website is a user whose visit is counted once no matter howsoever times the user visits the website is a given period,[301] and that the case practice of the Bundeskartellamt indicates that a unique user 'appears to be most suited to reflect the intensity of a platform's usage.'[302]

ii. Data harvesting

[298] BWB (n 32) para 10.
[299] CLRC Report (n 37).
[300] European Parliament, '*Challenges for Competition Policy in a Digitalized Economy'*, (July 2015) 60.
[301] 'Unique Users' (*WACA Web Analytics Consultants Association.*) <https://www.waca.associates/en/web-analytics-dictionary/unique-users-uus/> last accessed 19 October 2021.
[302] Bundeskartellamt, *Working Paper – "Market Power of Platforms and Networks",* (June 16) 70.

With the growth of the digital economy, the prospect of collecting, processing, and making commercial use of data has enhanced remarkably in every sector and businesses rely on data to provide improved products and services and raise economic efficiencies.[303] Therefore, data constitutes a *'core economic asset'* for companies.[304] When such companies are sold, the buyer gets access to the data harvested which may provide the combined entity with a competitive advantage over its peers and may eventually result in tipping effects. Similar concerns were raised in the Google/Fitbit case; however, the acquisition was allowed subject to several conditions one of them being that Google would not use the data received from Fitbit for Google Ads.[305]

Additionally, the accumulation of user data or any sort of data with one single entity can lead to tipping effects in the market, and this motivates businesses to engage in data-driven innovations. This in turn helps them to better assess consumer demands, habits, needs and preferences. Access to data can represent a form of competitive advantage.[306] It is important to note that since data is of such significant value for companies, they may engage in acquisition just for obtaining access to volumes of data held by nascent/small companies. However, this data exchanged in such mergers goes unaccounted for under the present turnover/asset based criterion of assessing mergers. Therefore, it is crucial that data be treated as an asset and be made a parameter under DVT for determining whether a merger requires investigation by the Regulator.

VII. NASCENT COMPETITORS

In cases of acquisitions in digital markets, there are many instances where an established player tends to acquire a new entrant in the market because that new entrant poses itself as a prospective competitor to the established player and thus, by acquiring the nascent entity the incumbent attempts to eliminate any competition that may arise in the future. A nascent competitor is a new entrant in a market whose innovation "represents a serious but uncertain future threat" to an

[303] Autorité de la concurrence/Bundeskartellamt, 'Competition Law and Data', (10 May 2016).
[304] Oskar Törngren, 'Mergers in big data-driven markets - Is the dimension of privacy and protection of personal data something to consider in the merger review?'(Thesis in EU law, 30, Stockholm University, Stockholm Autumn term 2017) page 9.
[305] European Commission *'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions'* (17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484> last accessed 28 October 2021.
[306] Chen Z and others, 'Data-Driven Mergers and Personalization', (2020) RAND Journal of Economics.

incumbent.[307] In an article[308] published in the University of Pennsylvania Law Review, the authors analysed the Microsoft-Netscape case,[309] where Netscape was perceived as a nascent competitor to Microsoft, and laid down three characteristics of a nascent competitor which Netscape possessed: a) Innovation; b) Future potency; and c) Threat to the incumbent.[310] Similarly, the acquisition of Instagram by Facebook in 2012,[311] is an example of a nascent competitor being acquired by an established player where Instagram with its innovative photo-sharing platform and growing user base[312] seemed to fulfil all the above-mentioned prerequisites for a nascent competitor. Facebook had scanned the market just like what Microsoft had done in the 1990s, in order to zero down to a nascent competitor.[313] The communications between the officials of Facebook reveal that Facebook was perceiving Instagram as its future rival. One email which was exchanged between the CEO and CFO of Facebook read as follows: *"The businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us."*[314]

Considering that nurturing innovation is one of the primary goals of Competition Law,[315] the regulatory authorities must strive to protect such nascent competitors. In India, the Regulator can adopt the above-mentioned criteria to identify nascent competitors and may disapprove such acquisitions where an incumbent is acquiring a nascent competitor. It is important that the Regulator is equipped with a method of identifying such new entrants. The Regulator can utilise the concept of Nascent Competitor for assessing the acquisition of such entities for AAEC at: a) the post notification stage of acquisitions which breach the threshold set under DVT; and b) in the *ex-post* review process.

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[307] C. Scott Hemphill & Tim Wu, '*Nascent Competitors'*, (2020) 168 U. Pa. L. Rev 1879, 1883. [Hereinafter, *Scott and Wu*].
[308] ibid.
[309] United States of America v Microsoft Corp, United States Courts of Appeal District of Columbia Circuit, (2001) Federal Reporter 34.
[310]Scott and Wu (n 52).
[311] Evelyn Rusli, 'Facebook Buys Instagram for $1 Billion', April 9, 2012. <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/> last accessed 28 October 2021.
[312] AlexiaTsotsis 'With Over 30 Million Users on IOS, Instagram Finally Comes to Android' (April 3 2012) <https://techcrunch.com/2012/04/03/instagram-android-demum/?_ga=2.247509377.787894779.1647323546-884896453.1647323545> last accessed 28 October 2021.
[313] Sam Schechner & Parmy Olson, 'Facebook Feared WhatsApp Threat Ahead of 2014 Purchase, Documents Show'. (Nov. 6, 2019), <https://www.wsj.com/articles/facebookfeared-whatsapp-threat-ahead-of-2014-purchase-documents-show-11573075742> last accessed 28 October 2021.
[314] Email from Mark Zuckerberg, Chairman and CEO of Facebook, Inc., to David Ebersman, CFO of Facebook, Inc. (Feb. 27, 2012) [https://perma.cc/4B6V-S42E].
[315]Scott and Wu (n 53).

VIII. POST-MERGER REGULATION

Firstly, in digital markets, there remains compelling uncertainty regarding the development of a target's products,[316] which may act as a hindrance in assessing whether the acquisition will cause AAEC or not. Secondly, it cannot be denied that competition regulators around the world, including in India, have little practice whatsoever in investigating mergers and acquisitions in digital markets. Additionally, since there is no case practice or empirical study regarding DVT in India, its shortcomings and drawbacks are undiscovered. Consequently, there may be cases where DVT fails in its objective and a potential AAEC causing merger/acquisition bypasses the scrutiny of the Regulator. To overcome the above-mentioned dilemma, there is a need of a provision of post-merger regulation/*ex-post* review where the Regulator is vested with the authority to intervene and break up such mergers which appeared benign at the pre-merger stage but turn out to be anti-competitive post-completion.

Presently, a few countries have vested the power of *ex-post* review with their competition regulators which include the US, Japan, Hungary, and the UK.[317] The Japan Fair Trade Commission had conducted an *ex-post facto* review in the acquisition of Nihon Ultmarc by M3,[318] and Fitbit by Google,[319] on the grounds of a possibility of restraint of competition and large value of total consideration respectively. Aside from that, the Autorité de la concurrence, the French Competition Regulator, in June 2018 had suggested the introduction of *'ex-post control'* of mergers, where the French Regulator would be authorized to step in and conduct a thorough investigation if there appears even a mist of an anti-competitive environment post the merger or acquisition.[320]

One of the major advantages of having an *ex-post* review is that it is conducted after the completion of a merger. This means that it will be easy for the Regulator to assess the merger for potential AAEC given that the Regulator will already be disseminated with the economic data of the merged entity. In several cases, it may be possible that the actual anti-competitive character

[316] OECD Secretariat Background Note, "*Start-ups, Killer Acquisitions and Merger Control",* (10-12 June 2020), para 49.
[317] ibid para 187.
[318] Japan Fair Trade Commission, 'The JFTC Reviewed the Acquisition of Shares of Nihon Ultmarc Inc. by M3, Inc' (2019) <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html> last accessed 28 October 2021.
[319] Japan Fair Trade Commission, 'The JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC' (2021) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html> last accessed 28 October 2021.
[320] *"Modernization and Simplification of Merger Control"* (*Autorité de la concurrence* June 7, 2018) <https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/07-june-2018-modernization-and-simplification-merger-control> last accessed 28 October 2021.

of a merger is revealed only after its completion. Such mergers/acquisitions can only be blocked or reviewed if the Regulator is provided with the power of *ex-post* review.

Therefore, it is evident that there is a requirement of an *ex-post* review in the Indian merger control regime so that in case any potential anti-competitive combination escapes the Regulator's scrutiny, for the reasons mentioned above, the authorities are still left with an option of investigating into the combination at a later stage. Apart from this, for proper implementation of the *ex-post* review, it is important that a right time limit is set within which the Regulator can intervene for investigation. On one hand, if a shorter time frame is set, it can lead to incomplete investigation due to inadequate data to estimate the true effect of the combination,[321] whereas a longer time frame may make investigation extremely difficult due to significant integration.[322] The success of *ex-post* regulation is directly dependent on the time limit set for investigation. Thus, the time frame must be set in such a manner that it captures all the possible effects of a combination,[323] and the Regulator must be provided with the authority to determine the suitable time frame for *ex-post* review.

IX. CONCLUSION

Presently, the competition regime in India is not equipped to efficiently deal with mergers and acquisitions taking place in digital markets which provides an easy opportunity for companies to stifle competition in the market. Deal-value Threshold attempts at resolving the issue by fixing the loopholes under the present threshold-based merger control regime by ensuring that the acquisition of start-ups and nascent competitors is notified to the Regulator. The authors believe that DVT would be better able to regulate mergers and acquisitions when it is coupled with qualitative thresholds, such as user base and data harvested by target entities, and *ex-post* review. However, the merger control provided by DVT should be implemented with precaution so that it does not end up over-regulating the process. Over-regulation would make the merger review process cumbersome which might discourage even benign mergers/ acquisitions from taking place. This will cause a detrimental effect on innovation which would further dissuade foreign companies from doing business in India and would be detrimental to the country's economy. The above scenario will lead to an adverse effect on innovation and investment, which would take a

[321] Duso, Tomaso & Spagnolo, Giancarlo & Buccirossi, Paolo & Ciari, Lorenzo & Fridolfsson, Sven-Olof & Vitale, Cristiana, 'A Short Overview of a Methodology for the Ex-Post Review of Merger Control Decisions', De Economist (2008) 22. [Hereinafter, *Duso*].
[322] Pike (n 23) para 190.
[323] Duso (n 67).

toll on the ease of doing business in the country. There is also a possibility that over-regulation may cause a boomerang effect, and instead of promoting competition, it would end up curtailing it. Therefore, to overcome this problem, the authors suggest that an approach of checks and balances between antitrust scrutiny and innovation must be adopted by the Regulator and DVT should be implemented only after evaluating all the probable consequences that may arise post-implementation.